

THE INDIAN LAW REPORTS.

ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH

REPORTED BY:

Privy Council — J V WOODMAN, *Middle Temple*
High Court, Allahabad — W K PORTER, *Gray's Inn.*

VOL XXXIV.
1912

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JUDGES OF THE HIGH COURT OF JUDICATURE
FOR THE NORTH WESTERN PROVINCES.

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JUDGES OF THE HIGH COURT OF JUDICATURE FOR THE NORTH WESTERN PROVINCES

1912

CHIEF JUSTICE

THE HON'BLE SIR HENRY GEORGE RICHARDS, KT, K C

PUISNE JUDGES

THE HON'BLE SIR G E KNOX, KT

" P C BANERJI

" SYED KARAMAT HUSAIN *(Retired on the 30th June 1912)*

" SIR H D GRIFFIN, KT, *(On deputation from the 2nd April to the 26th July 1912)*

" W TUDBALL

" E M DESC CHAMIER, *(On privilege leave from the 9th July to the 8th August 1912)*

" SYED MUHAMMAD RAFIQ, *(Took his seat on the 1st July 1912)*

" T C PIGGOTT *(Officiated from the 9th [illegible] to the 22nd [illegible])*

THE
INDIAN LAW REPORTS,
ALLAHABAD SERIES.

APPELLATE CIVIL

Before the Hon ble Mr H G Richards Chief Justice and Mr Justice Tudball

MUHAMMAD USMAN (PLAINTIFF) v MUHAMMAD ABDUL GHAFUR AND ANOTHER (DEFENDANTS) *

Pre-emption—Muhammadan law—Demand made " on the premises " — Demand made in the abadi which was part of the premises sold

Where a person claiming pre-emption in respect of a certain zamindari share proved that he had made the demand with witnesses while sitting on his *chabutra* in the *abadi* which formed part of the premises sold it was *held* that the demand of pre-emption was a good demand made " on the premises " within the meaning of the Muhammadan law *Kulsum Bibi* v *Faqir Muhammad Khan* (1) followed.

THIS was a suit for pre emption of a zamindari share, the claim being based on the Muhammadan law The court of first instance (Munsif of Muhammadabad Gohna) dismissed the suit holding that the requirements of the Muhammadan law as to the preliminary demands had not been complied with The claimant had in fact made the demand in the presence of witnesses as soon as he heard of the sale, while sitting on his *chabutra* in the *abadi* of the village of which the property sold formed part The plaintiff appealed, but his appeal was dismissed by the District Judge on grounds which are stated in the judgement of the High Court The plaintiff thereupon appealed to the High Court

Maulvi *Ghulam Mujtaba*, for the appellant

Mr *Abdul Raoof*, for the respondents

RICHARDS, C J, and TUDBALL, J —This appeal arises out of a suit for pre emption based on Muhammadan law The

* Second Appeal No 1328 of 1910 from a decree of Ram Autar Pande District Judge of Azamgarh dated the 26th of September 1910 confirming a decree of Iftikhar Husain Munsif of Muhammadabad Gohna, dated the 12th of February 1910

(1) (1896) I. L. R., 18 All., 298.

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MUHAMMAD USMAN v MUHAMMAD ABDUL GHAFUR

property consisted of a zamindari share It is suggested, and it appears to be the case, that there has been an imperfect partition under which the vendor holds exclusive possession of a certain part of the zamindari The *abadi*, however, remains common property of the proprietors of the mahal, and there can be no doubt that the vendor and the plaintiff are each owners of fractional shares in the mahal The plaintiff alone produced evidence on the question of compliance with the Muhammadan law of demand The moment that the news of a sale was received, the plaintiff demanded his *shufa* and invoked witnesses He alleged in the plaint that after this notice was given to the vendee The court of first instance decided against the plaintiff on the ground that two separate demands were necessary and that the two demands could not be combined The lower appellate court confirmed the decree of the court of first instance, holding, first, that the demand with witnesses being made by the plaintiff while sitting on his *chabutra* in the *abadi*, could not be deemed a good demand under the Muhammadan law, and secondly, that there had been at one time a contract of pre emption entered into between the co sharers, and that this contract must be held once and for all to have abrogated all right of pre emption based on Muhammadan law, and this, notwithstanding that the period covered by the contract had determined on the expiry of the settlement It has not been argued before us that the two demands could not be combined, and the respondent, as we think rightly has not relied on the decision of the lower appellate court that the contract abrogated the plaintiff's right under the Muhammadan law The question before us has been confined to whether or not the demand with witnesses made on the plaintiff's own *chabutra*, can be deemed a good second demand according to Muhammadan law Muhammadan law requires that the second demand shall be in the presence of the vendor or on the premises It is quite clear that the demand was not made in the presence either of the vendor or of the vendee It was however made in the *abadi*, which undoubtedly was part of the premises sold It is quite true that it was the plaintiff's own *chabutra* in the sense that it was the *chabutra* belonging to his residence in the village

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MUHAMMAD USMAN v MUHAMMAD ABDUL GHAFUR

In the case of *Kulsum Bibi* v *Faqir Muhammad Khan* (1) it was held that the demand made in the village, a fractional share of which had been sold, was a good demand on the premises according to Muhammadan Law We find it impossible to distinguish the present case from the case cited The plaintiff when making the demand was actually standing on joint property It is contended that the demand was not *bonâ fide*, and the court below had found, as a matter of fact, that the demand was not *bonâ fide* We do not think that the court arrived at any such finding The Court was merely quoting a passage from the judgement of the Bench which decided the case of *Kulsum Bibi* v *Faqir Muhammad Khan* The demand was a perfectly *bonâ fide* demand if it was openly made with the intention of asserting the right to pre emption We have already stated that in the plaint the plaintiff alleged that after the demand had been made, actual notice was given to the defendant vendee, and this allegation was admitted in the written statement Under the circumstances it is quite impossible to hold that there was any *mala fides* about the demand We think that it must be held that the demand was a sufficient compliance with the Muhammadan law The case, however, was decided upon a preliminary point and must be remanded We accordingly allow the appeal, set aside the decrees of both the courts below, and remand the case to the court of first instance, through the lower appellate court, with directions to re admit it under its original number and determine the same according to law Costs here and heretofore will abide the result

Appeal allowed

(1) (1896) I L R 18 All, 29

1911
July 10

Before Mr Justice Karamat Husain and Mr Justice Chamier

BENI RAM AND OTHERS (DEFENDANTS) v MAN SINGH (PLAINTIFF)

Hindu law—Mitakshara—Joint Hindu family—Father committed to the Court of Session—Loan taken for his defence—Legal necessity

Held that the necessity of raising money to pay for the defence of the head of a joint Hindu family committed to the Court of Session on a serious criminal charge was a valid legal necessity such as would support a mortgage of the family property executed by the father and one of his sons for such purpose *Chandradeo* v *Mata Prasad* (1) *Luchmun Koour* v *Mudaree Lall* (2) and *Duleep Singh* v *Sree Kishoon Panday* (3) referred to

THE facts of this case were as follows —

One Mathura Prasad, the head of a joint Hindu family, was committed to the Court of Session on charges under sections 467 and 471 of the Indian Penal Code In order to raise funds for his defence, Mathura Prasad, with one of his sons, Janki Prasad, mortgaged some of the family property for the sum of Rs. 2,000 The present suit was to bring the mortgaged property to sale for realization of the mortgage debt, at the date of suit amounting to Rs 10,094-14 3 The defendants were Janki Prasad and Beni Ram, sons of Mathura Prasad, and Gajadhar and Raj Bahadur, sons of Janki Prasad The court of first instance (Subordinate Judge of Agra) decreed the claim The defendants appealed to the High Court, where the principal questions raised were whether the deed of mortgage was duly executed and registered and whether it could be enforced against Beni Ram, Gajadhar and Raj Bahadur

Mr *Nihal Chand* (with him Babu *Jogindro Nath Chaudhri*) for the appellants

The Hon ble *Nawab Muhammad Abdul Majid* (with him Maulvi *Ghulam Mujtaba*), for the respondent

CHAMIER, J —This was a suit by the respondent to enforce a mortgage deed executed in his favour by Mathura Prasad, and his son, Janki Prasad. The defendants to the suit were Janki Prasad, Beni Ram another son of Mathura Prasad, and Gajadhar and Raj Bahadur, sons of Janki Prasad The principal sum secured by the deed was Rs 2,000 The claim was for

First Appeal No 15 of 1910 from a decree of Sheo Prasad, Subordinate Judge of Agra, dated the 6th of October 1909

(1) (1909) I. L. R. 31 All., 176 (2) (1850) 5 S D A., N W P., 327
(3) (1872) 4 N.-W P H. C. Rep., 83

Rs 10,094 14 3 and that amount has been decreed. In the court below it was contended by the defendants that the provisions of the deed relating to interest were unconscionable and should not be enforced. The contention was overruled and has not been repeated here. The only questions for decision are whether the deed in suit was duly executed and registered, and whether it can be enforced against the appellants, Beni Ram, Gajadhar and Raj Bahadur.

Of the marginal witnesses to the deed, Bhola Nath is dead and Piari Lal has disappeared. The two remaining witnesses, Chiddu and Chiranji Lal, a brother of Mathura Prasad, did their best to minimize the effect of their testimony, but both had to admit that the deed was signed by Mathura Prasad and Janki Prasad. Another witness, Jai Ram, whom the court below has believed, said that Mathura Prasad and Janki Prasad signed the mortgage deed in his presence in the Muttra jail. Chiranji Lal, Brahman, proves the due execution by Mathura Prasad, of a power of attorney, authorizing Janki Prasad to procure the registration of the mortgage deed. There can, I think, be no doubt that the mortgage was duly executed and registered.

Mathura Prasad had been committed to the Court of Session on charges under sections 467 and 471 of the Indian Penal Code, and the money was borrowed for the purpose of engaging counsel to defend him at the trial. The mortgagee was aware of the purpose for which the money was being borrowed. Mathura Prasad was ultimately convicted and sentenced to several years' rigorous imprisonment. The question is, whether the mortgage made in these circumstances is binding upon the other members of the family. According to the *Mitakshara* one member of a joint family may 'effect a gift, mortgage or sale of family property in time of distress for family purposes and especially for religious purposes.' Mathura Prasad was the manager of the family property and the mortgage must be held to be binding upon the family if it comes within the rule just stated.

According to the decision of the majority of the Full Bench in *Chandradeo* v. *Mata Prasad* (1), the mortgagee must make out a

(1) (1909) I. L. R., 31 All., 176

1911

BENI RAM v. MAN SINGH

Chamier J

case of necessity, although the persons against whom he is seeking to enforce his mortgage are the sons and grandsons of the mortgagor If we were at liberty to adopt the view taken by the minority in that case, the present case would be clear enough As we are bound by the opinions of the majority, we have to inquire whether there was legal necessity for the loan Legal necessity is of various kinds and when one gets outside religious and other well recognized classes of necessity, there seems to be room for considerable difference of opinion as to whether a given expenditure is a legal necessity or not, although a learned writer on the Hindu Law has said that to any one acquainted with the inner life of Hindu families, it will be at once clear whether any particular instance of family expenditure is proper or not (Bhattacharyya on the Hindu Joint Family, Tagore Law Lectures, 1884 5, p 458)

The cases of *Mahabir Prasad* v *Basdeo Singh* (1), *Khalil ul Rahman* v *Gobind Pershad* (2), *Pareman Dass* v *Bhattu Mahton* (3), *Durbar Khachar* v *Khachar Harsur* (4), *Sumer Singh* v *Liladhar* (5), *Natasayyan* v *Ponnusami* (6), *McDowell* v *Ragava Chetty* (7), *Erasala Gurunatham Chetty* v *Adepally Raghavalu Chetty* (8) and *Prayag Sahu* v *Kasi Sahu* (9), which were cited in the arguments afford little, if any, assistance, for in all of them the question was whether a father's liability originating either in the commission of a crime or the breach of a civil duty could be enforced against the family property in the hands of his sons or grandsons In all of them the question discussed was whether the debt incurred was illegal or immoral The question of legal necessity was not discussed in any of those cases On the question of necessity the respondent has relied upon the cases of *Luchmun Koour* v *Mudaree Lall* (10) and *Duleep Singh* v *Sree Kishoon Punday* (11) In the former the Court Pandit was of opinion that a case of *musibat* or family necessity had been established The facts were that the head of a Hindu joint family

(1) (1884) I L. R. 6 All 234
(2) (189) I. L. R., 20 Calc., 328
(3) (1 97) I L. R., 24 Calc. 672
(4) (1908) I. L. R., 32 Bom., 348
(5) (1911) I. L. R., 33 All., 472.
(6) (1893) I L. R. 16 Mad., 99
(7) (1903) I. L. R., 27 Mad., 71
(8) (1908) I L. R., 31 Mad 472.
(9) (1911) 11 C L J 599
(10) (1850) 5 S D A., N W P., 327
(11) (1872) 4 N W P., H C Rep 83

had been sent to prison on account of non-payment of a fine, and several decrees were being executed against him and the property was sold in order to pay off the decrees and obtain his release from prison. In the latter case a member of a joint family had been committed to a special commissioner on a charge of dacoity. While awaiting trial in order to obtain his release, he raised money by selling family property and purchased his discharge from prison, it being the policy of Government at the time to discontinue criminal proceedings against persons who made restitution to the parties whom they had injured. The Court, while not expressing any opinion as to the soundness of the decision in the case of *Luchmun Koour* v. *Mulloree Lall*, held that sufficient necessity had been established to warrant the inference of assent to the sale by the minor members of the family. If those cases were rightly decided, there can be no doubt that there was legal necessity for the mortgage in the present case. I think it is doubtful whether either of these cases would now be followed. In one of them the father had been convicted of a criminal offence and sentenced to pay a fine, and in the other the vendor of the property expressly admitted responsibility for a dacoity. There is, however, a clear distinction between selling or mortgaging property in order to obtain the release from jail of a member of the family who has been shown to be guilty of a criminal offence and selling or mortgaging property in order to raise funds for the defence of a member who has been accused in a criminal court. In the one case the family has been disgraced and the release of the offender will not remove that disgrace. It is also desirable that an offender should suffer for his misdeeds. In the other the family is threatened with disgrace, and the intention is to ward it off. According to our system of jurisprudence and practice [illegible] man is presumed to be innocent until his guilt is established. The question, whether in such a case as this legal necessity [illegible] for raising money cannot depend upon the result of the trial [illegible] must be remembered that the deed in suit is signed not [illegible] Mathura Prasad, who presumably knew that he was [illegible] also by his son Janki Prasad, who is not shown to have [illegible] thing to do with the offence, and who was *de facto* [illegible] family affairs, while his father was in the lock-up. I [illegible]

1911

Hori Ram v. Ram Hit [illegible]

Chamier, J.

1911

Beni Ram v Man Singh

any more pressing necessity could exist from the point of view of members of a Hindu family than the necessity for raising money to defend the head of the family against a serious criminal charge In determining whether or not a case of *musibat* has been made out one must have regard to the probable intention of the author of the rule and to the class for whom the rule was intended It is not suggested that an excessive amount of money was raised, and the plea that the terms of the mortgage are unconscionable has been abandoned I am of opinion that the Court below was right in holding that a case of necessity has been made out I would dismiss the appeal with costs

KARAMAT HUSAIN, J —I agree

BY THE COURT —The order of the Court is that appeal be dismissed with costs

Appeal dismissed

1911
July 10

Before Mr Justice Sir George Knox and Mr Justice Karamat Husain

CHUNNI LAL AND ANOTHER (DEFENDANTS) v SITA RAM (PLAINTIFF)

Suit for declaration of invalidity of an adoption—Suit dismissed as time barred—Plaintiff debarred from obtaining a decree for possession on title

When the setting aside of an adoption is essential to the granting of a decree for possession of immovable property the fact that a suit to set aside the adoption has become time barred is a bar to the granting of a decree for possession on title *Lachman Lal Chowdhri* v *Kanhaya Lal Mowar* (1) referred to *Natthu Singh* v *Gulab Singh* (2) and *Chandania* v *Salig Ram* (3) distinguished

THE facts of this case were as follows —

On the death of one Musammat Maghi Bai, widow o one Banke Das, the defendant, Chunni Lal, claiming to be the adopted son of Banke Das, obtained entry of his name in place of tha of Maghi Bai He thereafter sold a portion of the property Thereupon the plaintiff, Sita Ram, brought a suit for a declaration that Chunni Lal was not an adopted son, that the sale deed executed by him was null and void, and for possession of the property on the ground of the plaintiff being the next reversioner He also prayed for an alternative relief that in the event of its

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Second Appeal No 326 of 1909 from a decree of F S Tabor District Judge of Banda, dated the 18th of January 1909 modifying a decree of Achal Bihari Subordinate Judge of Banda dated the 19th of November 1908

(1) (1894) I L R, 22 Calc 609 (2) (1895) I L R, 17 All, 167
(3) (1904) I L R, 26 All, 40

being found that Chunni Lal was the adopted son and the sale deed was valid, the plaintiff might be given a decree for pre emption The Subordinate Judge held that the claim for a declaration was time barred and that, therefore, the adoption could not be questioned, and gave a decree for pre emption The plaintiff appealed The defendant Chunni Lal and his vendee filed cross objections against the decree for pre emption The District Judge held that the alleged adoption, being that of a sister's son, was invalid, that the claim for a declaration was time-barred, that the declaration was not essential to the granting of a decree for possession, and that the claim for possession was within time He dismissed the claim for a declaration, decreed the claim for possession, and dismissed the cross objections The defendants appealed to the High Court against the decree for possession The appeal was heard by KARAMAT HUSAIN, J, who subsequently referred it to a Bench of two Judges

Munshi *Jang Bahadur Lal*, for the appellants —

The court having distinctly dismissed the prayer for a declaration [illegible] not merely a decree for possession [illegible] [illegible] as between [illegible] the adoption was valid and could not be questioned [illegible] consequence of this, no decree for possession could have been given The plaintiff did not appeal from that part of the decree which disallowed the declaration, and it has become final The claim for possession must, therefore, necessarily fail

Babu *Piari Lal Banerji* (for Mr *A H C Hamilton*, Babu *Durga Charan Banerji*, with him), for the respondent —

Although the prayer for a declaration is time barred, yet as the suit is for possession as well the period is 12 years article 141, and not article 118, governs the case, *Natthu Singh* v *Gulab Singh* (1) The effect of dismissal of the prayer for declaration is not to make the adoption valid The only result is that I can not get that relief The smaller relief of declaration which was open to me is now time barred, and I cannot get it But I am entitled to a larger relief, namely, possession It was not on the merits that the suit for declaration was dismissed On the contrary, the finding of the lower appellate court is that the

(1) (1895) I L R, 17 All, 167

1911

Chunni Lal v. Sita Ram

adoption, if it took place, was invalid. The claim was dismissed on a point of limitation. If a widow makes an adoption, but retains possession herself, and the reversioner brings a suit, after six years have expired, for a declaration of the invalidity of the adoption, he being not then entitled to sue for possession as well, and the court holds that the adoption is invalid, but dismisses the suit on the ground of limitation, can he not, afterwards, sue for and obtain possession? The dismissal of a suit on the ground of limitation does not mean that all the issues in the case are found and decided against the plaintiff. A declaration is not a condition precedent for a decree for possession. This is laid down in I. L. R., 17 All., cited above, and in *Ram Chandra Mukerjee* v. *Ranjit Singh* (1), *Chandania* v. *Salig Ram* (2), *Basdeo* v. *Gopal* (3), *Ghandharap Singh* v. *Lachman Singh* (4) and *Jagannath Prasad Gupta* v. *Runjit Singh* (5).

Munshi *Jang Bahadur Lal*, in reply:—

Although it might have been unnecessary for the plaintiff to sue for a declaration, still in this case he chose to ask distinctly and separately for that relief. That was dismissed, and that part of the decree was allowed to become final. The plaintiff must take the consequences. In none of the cases cited on the other side was there a decree disallowing a declaration. The case of *Mallarjun* v. *Narhari* (6) supports me.

KNOX and KARAMAT HUSAIN, JJ.:—KARAMAT HUSAIN, J., by his order, dated the 8th of March, 1911, referred this appeal to a Bench of two Judges. The facts are these:—The owner of the property in dispute died about 1893. His widow, Maghi, took possession of the property, and adopted Chunni Lal to her husband in 1900. After her death in that year, Chunni Lal on the 10th of December, 1900, applied for mutation of names in his favour, and Narain, father of the plaintiff, objected. His objection was disallowed and the name of Chunni Lal was entered in April, 1901.

Chunni Lal, on the 25th of June, 1907, sold a portion of the property to Mata Din. The plaintiff, on the 25th of June,

(1) (1899) I. L. R., 27 Calc. 242 (254).
(2) (1903) I. L. R., 26 All., 40.
(3) (1886) I. L. R., 8 All., 644.
(4) (1888) I. L. R., 10 All., 485.
(5) (1897) I. L. R., 25 Calc., 354.
(6) (1900) I. L. R., 25 Bom., 337 (350).

1908, brought an action against Mata Din and Chunni Lal He sought three reliefs, (1) a declaration that the adoption of Chunni Lal was invalid, (2) recovery of possession of the property, and (3) in the alternative possession by right of pre emption The court of first instance dismissed the suit for declaration and possession and decreed that for pre emption

The plaintiff, appealed and the defendants filed objections under order XLI, rule 22 The lower appellate court came to the conclusion that the adoption was invalid, but that the suit being one for possession was not barred by time It gave the plaintiff a decree in the following terms —"The decree of the lower court, dated the 12th November, 1908, be modified and the claim be decreed in part with proportionate costs, the claim for declaration be dismissed and the claim for possession of the property be decreed with proportionate costs The respondent's objection be dismissed with costs" The defendants come to this Court in second appeal, and it is urged by their learned vakil that the result of the dismissal of the plaintiff's claim for a declaration that the adoption of Chunni Lal is invalid is that, so far as the plaintiff is concerned, Chunni Lal's adoption cannot be questioned, and that his suit, therefore, for possession must fail The learned vakil for the respondent argues that the lower appellate court in its judgement has found the adoption to be invalid, that the dismissal of the plaintiff's suit for a declaration of the invalidity of the adoption on the ground of limitation does not make the adoption valid, and that in a suit for possession on title a court may find an adoption to be invalid, although a suit for the invalidity of the adoption may be barred by time. In support of his contention he refers to *Natthu Singh* v *Gulab Singh* (1) and *Chandania* v *Salig Ram* (2) and says that notwithstanding the dismissal of the claim for a declaration that the adoption was invalid, a decree for possession on title could be given In none of the rulings referred to by the learned vakil for the respondent had the suit for a declaration of the invalidity of the adoption been dismissed, and those rulings are, therefore, distinguishable from the case before us The dismissal of the plaintiff's suit for the declaration that the adoption was invalid precludes him

(1) (1895) I. L. R., 17 All., 167 (2) (1903) I. L. R., 26 All., 40.

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Chunni Lal
v
Sita Ram.

from questioning the validity of the adoption, and without establishing that the adoption is invalid, he cannot establish his title to possession His suit for possession must therefore fail If the avoidance of a juristic act is essential for the completion of a plaintiff's title for possession and the suit for such avoidance is time-barred, it is difficult to see how a suit for possession on title can succeed, and the remarks of their Lordships of the Privy Council in *Lachman Lal Chowdhri* v *Kanhaya Lal Mowar* (1) favour that view, but as the trend of authority in this Court is the other way and as it is unnecessary to discuss that point in the present appeal, we refrain from entering into that question

For the above reasons we allow the appeal, dismiss the plaintiff's claim for possession and direct the lower appellate court to try the following issues with reference to the claim of the plaintiff for pre-emption

(1) Is the plaintiff entitled to pre-emption on the basis of the *wajib ul arz*?

(2) If he is, what is the price paid by Mata Din for the property claimed?

Additional evidence may be received Ten days will be allowed for objections

Mr *Banerji*, for the respondent, admits that findings have been returned to both the above points by the lower appellate court and that he accepts those findings

Upon those findings we decree the plaintiff's claim for pre-emption and direct that if he pay Rs 150 on or before the 10th day of October, 1911, a decree be issued in his favour If the amount be not so paid, the suit will stand dismissed with costs in all courts The appellants will get the costs of this appeal

Appeal decreed

(1) (1894) I. L. R., 22 Calc., 609 at 611.

Before Mr Justice Sir George Knox and Mr Justice Karamat Husain

1911
July 10

JIWAN RAM (DEFENDANT) *v* TONDI SINGH (PLAINTIFF)

Letters Patent section 10—Appeal—Appeal from a dissentient judgement in an appeal under section 10—Pre-emption—Wajib-ul-ar—Custom or contract—Partition of village—No new wajib ul arz framed—"Hissadar deh"—Construction of document

Held that an appeal will lie under section 10 of the Letters Patent from the judgement of a Judge who has differed from his colleague in an appeal under the same section

The wajib ul arz of an undivided village gave a right of pre emption first to a near co sharer (*hissadar karib*) and then to a co sharer in the village (*hissadar deh*) Subsequently the village was divided by perfect partition into two mahals No new wajib ul arz was prepared In a suit for pre emption by the co sharers in one of the mahals consequent upon a sale of property situated in another mahal to a stranger —

Held that the right might be enforced notwithstanding the partition [illegible] *mahal* [illegible] by KARAMAT HUSAIN J [illegible] *Singh* (1) [illegible] referred to

The fa[illegible]e were as follows —

The respondent brought a suit for pre-emption in respect of the sale of a certain property in a village, basing his claim on the custom prevailing in the village At the time when the wajib ul arz was prepared, there was only one mahal in the village This wajib ul arz bore the date of 1272 Fasli Subsequently the village was divided into two mahals, but no fresh wajib ul-arz was prepared The pre emptor in the present case was a sharer in one mahal and the property sought to be pre empted was situated in the other

The defence to the suit was that no custom of pre emption existed, and that further by reason of the partition the pre emptor had lost all right to pre empt

The first two courts held that the wajib ul arz recorded a custom and that the plaintiff could pre empt, inasmuch as the subsequent partition did not affect his pre-emptive rights

A second appeal was preferred to the High Court and was heard by a Judge sitting singly He held that the plaintiff had lost his right by reason of the partition and dismissed the suit From this decision an appeal was preferred under section 10 of

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*Appeal No 16 of 1910 under section 10 of the Letters Patent

(1) (1899) I L R 22 All, 1   (2) (1910) I L R, 32 All, 205

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JIWAN RAM v TONDI SINGH

the Letters Patent and was heard by a bench of two Judges, consisting of STANLEY, C J, and BANERJI, J The two Judges differed in opinion, the Chief Justice holding that the partition did not affect the right of the plaintiff, while BANERJI, J, was of opinion that the pre emptor had lost his right by reason of the partition The judgements are reported in I L R, 32 All, 265 (s v *Dori* v *Jiwan Ram*) The decision of the Chief Justice prevailed, and an appeal was again preferred under section 10 of the Letters Patent

Babu *Durga Charan Banerji* (with him Babu *Girdhari Lal Agarwala*) —

No appeal lay Under the Civil Procedure Code the opinion of the Judge agreeing with the lower court prevailed, and by section 27 of the Letters Patent the opinion of the senior Judge was given preference From such a decision passed in an appeal under the Letters Patent, the Letters Patent gave no further right of appeal That right was confined to appeals from a decision of a single Judge or from the decision of a bench when the Judges constituting it differ A right to appeal under the circumstances was not given and a right to appeal must be given by statute The Judges trying the case in appeal might again differ, then a third appeal under the Letters Patent would have to be brought The law could not have contemplated that So far as this country was concerned, a decision of the senior Judge of a bench hearing an appeal under the Letters Patent was to be final

Babu *Sital Prasad Ghosh* (with him Babu *Jogindra Nath Mukerji*) for the appellant —

The section only said that the decision of the senior Judge would prevail for the purposes of that appeal, not that it would be final But a decision of Judges in an appeal under the Letters Patent was the decision of a Division Bench. It came under the second class contemplated by section 10 of the Letters Patent The Chief Justice constituted the Division Benches under section 13 of the Charter Act. If there is a difference between the Judges, an appeal lies under the Letters Patent If it were other wise, the result might be that a single Judge of the High Court could overrule two or more Judges.

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Jiwan Ram
v
[illegible]

KNOX and KARAMAT HUSAIN, JJ —A preliminary objection has been raised to the hearing of this appeal to the effect that no appeal lies The case before us came originally in second appeal before a Judge of this Court sitting alone From his judgement an appeal was filed under section 10 of the Letters Patent and was heard by two Judges of this Court The two Judges were equally divided in opinion, and, as provided in the Letters Patent, the opinion of the senior Judge prevailed From this opinion of the senior Judge, an appeal has again been filed Section 10 of the Letters Patent is cited as authority for filing this appeal We are told that no precedent could be found which exactly covers the case before us, and no such case appears to have arisen before any of the High Courts in India. We have not been able to find any case exactly in point We are, therefore, thrown back upon the words as contained in section 10, Omitting for the time being such words of the section as have no bearing upon the case before us, that section will run as follows —"And we do further ordain that an appeal shall lie to the said High Court from the judgement of one Judge of the said High Court, and that an appeal shall also lie to the said High Court from the judgement of one Judge of any Division Court wherever such Judges are equally divided in opinion" The words stand unlimited and give an unlimited right of appeal wherever there may occur a judgement of two Judges of this Court, when these Judges are equally divided in opinion

It was contended that the appeal should lie to the High Court as a whole We have considered that point also Section 13 of the High Court Act, 1861, provides for the exercise of the appellate jurisdiction vested in this Court in such manner as may appear to this Court to be convenient for the due administration of justice and provided for by the rules of this Court The only rule that bears upon the present case is rule 4, read with rule 1, and that provides that every case other than a case mentioned in rule 1, and rule 1 does not provide for a case such as the one before us, shall be heard and disposed of by a Bench of two Judges. The preliminary objection therefore fails

The case was thereupon argued on merits and judgement reserved.

1911

Jiwan Ram
v
Gondi Singh

The following judgements were delivered —

KNOX, J —I would dismiss this appeal It arises out of a suit for pre emption based upon custom as contained in the wajib ul arz The wajib ul arz under which the right is claimed is a wajib ul arz prepared under and in accordance with the provisions of Regulation VII of 1822 According to the Regulation that wajib ul arz is *primâ facie* evidence of the custom recorded in it unless and until it has been formally altered * It shall be shown by the result of a full investigation in a regular suit that the proceeding or record of the Collector was erroneous or incomplete No evidence has been given by the defendant I have therefore, to see what is the true construction to be placed upon its language The terms of it will be found fully set out at page 282, I L R, volume 32 As I read them they record a custom whereby a person holding a share in the *deh* of Dharera has a right of pre emption over and above a stranger This is what I understand the villagers of Dharera intended and what they understood and what the Settlement Officer found to be the custom [illegible] long as any one [illegible] as pr[illegible]

I [illegible] to app[illegible] with co[illegible]

KARAMAT HUSAIN, J —[illegible] property in the village Dharera was sold and a suit for pre emption on the basis of the wajib ul arz of 1272 Fasli brought The terms of the wajib ul arz are —

> Agar kisi hissadar ko haqiyat apni bai wa rehan aur murtahin ko rehan dar rehan karna ho to bawaqt intiqal ke lazim hoga ki pahle apna hissadar karib ko aur darsurat inkar uske dusre hissadar deh ko khabar dekar baqimat wajib bai wa rehan karo

[If any *hissadar* (sharer) has to sell or mortgage his *haqiyat* (interest) and if any mortgagee has to sub mortgage it, he at the time of the transfer must give information first to his near *hissadar* and in case of his refusal (to buy) to other *hissadar deh* (sharer in the village) and then sell or mortgage it (to others) for a proper price]

The village afterwards was divided into several mahals for which no new wajib-ul arz was framed The property sold was

* See Regulation VII, 1822, and *Ramji Dubain* v *Pahalwan Dharal*, I. L. R. 33 All., 190

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Karamat Husain, J

situate in one mahal and the pre emptor had a share in another mahal A single Judge of this Court held that a perfect partition put an end to the right of pre emption in respect of the property situate in a different mahal and the Full Bench case of *Dalganjan Singh* v *Kalka Singh* (1) applied He therefore dismissed the pre emptor's claim On appeal, the learned Judges who heard the appeal took different views STANLEY, C J, held that the plaintiff was entitled to pre empt notwithstanding the partition, and that the words *hissadar deh*, as used in this wajib-ul arz, meant a sharer in the village BANERJI, J, came to the conclusion that the plaintiff could not pre empt after the partition of the village, as, although he was a sharer in the village, he was not a co-sharer of the vendor, and that the words *hissadar deh*, as used in the wajib ul arz meant a co sharer of the undivided village for which the wajib ul arz had been prepared See *Dori* v *Jiwan Ram* (2) Hence this appeal It has been expressly laid down in the Full Bench case of Dalganjan Singh that, where on the perfect partition of a mahal under the North Western Provinces Land Revenue Act, 1873, no new wajib-ul-arz has been framed for any of the new mahals, the question whether or how far a contract or a custom of pre emption recorded in the wajib-ul-arz of the undivided mahal is still in force, or who is entitled to claim the benefit of it, is not capable of any absolute or invariable answer" This shows that the mere fact that the words *hissadaran deh* have been construed to mean "co sharers in the undivided village," is no reason for holding that the words "*hissadar deh*" in the present case also mean a co sharer in the undivided mahal and not a sharer in the *deh*, i e, village

Again, in interpreting a wajib ul arz according to the ruling in the case of *Dalganjan Singh* "no general considerations are of any value In every case we must place ourselves as nearly as possible in the position of the parties and have regard to surrounding circumstances" These remarks imply that the learned Judges who decided *Dalganjan Singh* v *Kalka Singh*(1) on placing themselves as nearly as possible in the position of the parties to the wajib ul arz and considering the surrounding

(1) (1899) I. L R., 22 All., 1 (2) (1910) I. L. R. 32 All., 2?5.

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JIWAN RAM v. TONDI SINGH

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I [illegible] appeal with costs

KARAMAT HUSAIN, J — [illegible] property in the [illegible] Dharera was sold and a suit for pre emption on the basis of the wajib ul arz of 1272 Fasli brought The terms of the wajib ul arz are —

Agar kisi hissadar ko haqiyat apni bai wa rehan aur murtahin ko rehan dar rehan karna ho to bawaqt intiqal ke lazim hoga ki pahle apna hissadar karib ko aur darsurat inkar uske dusre hissadar deh ko khabar dekar baqimat wajib bai wa rehan karo

[If any *hissadar* (sharer) has to sell or mortgage his *haqiyat* (interest) and if any mortgagee has to sub mortgage it, he at the time of the transfer must give information first to his near *hissadar* and in case of his refusal (to buy) to other *hissadar deh* (sharer in the village) and then sell or mortgage it (to others) for a proper price]

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* See Regulation VII 1822, and *Raturaji Dulain* v *Pahalwan Bhagat*, I. L. R., 23 All., 190

situate in one mahal and the pre emptor had a share in another mahal A single Judge of this Court held that a perfect partition put an end to the right of pre emption in respect of the property situate in a different mahal and the Full Bench case of *Dalganjan Singh* v *Kalka Singh* (1) applied He therefore dismissed the pre emptor's claim On appeal, the learned Judges who heard the appeal took different views STANLEY, C J, held that the plaintiff was entitled to pre empt notwithstanding the partition, and that the words *hissadar deh,* as used in this wajib ul arz, meant a sharer in the village BANERJI, J, came to the conclusion that the plaintiff could not pre empt after the partition of the village, as, although he was a sharer in the village, he was not a co sharer of the vendor, and that the words *hissadar deh,* as used in the wajib ul arz meant a co sharer of the undivided village for which the wajib ul arz had been prepared See *Dori* v *Jiwan Ram* (2) Hence this appeal It has been expressly laid down in the Full Bench case of Dalganjan Singh that, where on the perfect partition of a mahal under the North Western Provinces Land Revenue Act, 1873, no new wajib ul-arz has been framed for any of the new mahals, the question whether or how far a contract or a custom of pre emption recorded in the wajib ul arz of the undivided mahal is still in force, or who is entitled to claim the benefit of it, is not capable of any absolute or invariable answer" This shows that the mere fact that the words *hissadaran deh* have been construed to mean "co sharers in the undivided village," is no reason for holding that the words "*hissadar deh*" in the present case also mean a co sharer in the undivided mahal and not a sharer in the *deh,* i e, village

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(1) (1899) I L R. 22 All., 1 (2) (1910) I. L. R., 32 All., 2*5.

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JIWAN RAM v. TOTI SINGH

Karamat Husain J.

circumstances came to the conclusion that by using the words "*hissadaran deh* the framer of the wajib ul arz intended to confer the right of pre emption on the co sharers of the undivided *deh* meaning thereby the undivided mahal It must be taken for granted that in the case such surrounding circumstances did exist as forced the learned Judges to come to that conclusion It remains to be seen if in the case before us the circumstances are such as to make us conclude that the right of pre emption is intended for the co sharers of the undivided *deh* as one mahal *Deh* is a Hindi word and means a definite area of agricultural holdings with houses upon, and is thus a physical unit *Mahal* is a corruption of an Arabic word and is a legal term meaning "any local area held under separate engagement for the payment of the land revenue" *Deh* and *mahal* are two distinct conceptions In one *deh* there may be several *mahals* and in one *mahal* there may be several *dehs* or portions of them It, however, sometimes happens that a definite area of land is one *deh* and also one *mahal* This is a pure accident and must not lead to the erroneous notion that when the terms "*deh*" and "*mahal*" may be predicated of one and the same area of land, they became synonymous When the wajib ul arz of the village Dharera was framed in 1272 Fasli, it was one *deh* and also one *mahal* It was called a *deh* from the physical point of view and a *mahal* from the fiscal stand point The meaning of a "*hissadar* in the *deh* of Dharera" is quite distinct from the meaning of "a *hissadar* in the *mahal* of Dharera" The plain and natural meaning conveyed by the former is "a sharer in the physical entity called Dharera" without any notion of his liability to the payment of revenue, while the natural and ordinary meaning of the latter is "a co sharer in the mahal of Dharera who is a member of the co parcenary body jointly and severally responsible for the revenue of the mahal

There being a vast distinction between the word "*deh*" and the word "*mahal*," the plain meaning of a "*hissadar deh*" in the wajib ul arz we have to construe is "a sharer in the village Dharera," and there are no surrounding circumstances to lead me to infer that the intention of the framers of the wajib ul arz in question was to mean by those words "a co sharer in the undivided

mahal of Dharera" Had they any such intention, they would have used the expression "*hissadar mahal*" instead of "*hissadar deh*" Moreover, the distinction sought to be drawn between a "*hissadar deh*" and a "*hissadar mahal*" is too fine for the mental calibre of the class of people to which the ordinary framers of waib ul arzes belong Again, in the wajib ul arz before us there are indications which go to show that a "*hissadar deh*" means "a sharer in the village" and not "a co sharer in the undivided mahal" One is that the framers are stating a custom which exists in the "village" and not in the "mahal" Another is that they use the word "*hissadar*" in the singular number, showing there by a complete absence of the idea of the co parcenary body from their minds The existence of the expression, "As to the rights of co sharers among themselves based on custom or agreement," in the wajib-ul arz in *Dalganjan Singh's* case might have been one of the surrounding circumstances which led the Chief Justice to hold that "*deh*" in that wajib ul arz meant "*mahal*" There is nothing in the case before us to show that the word "*hissa dar*" in the beginning of the pre emption clause means "a co sharer in the undivided mahal of Dharera" to make me infer that that word in the expression "*hissadar deh*" also means "a co sharer in the undivided mahal of Dharera" The natural mean ing of the pre emption clause in the case before us to my mind is that at the time framing the wajib ul arz there existed a custom whereby *a sharer in the village* was entitled to pre empt The fact that he at that time was also a *co sharer in the undivided mahal* of Dharera was a mere accident and not the *differentia* on which the existence of the right of pre emption depends It is admitted in *Dalganjan Singh s* case that persons other than co sharers in an undivided mahal can have the right of pre emption after a perfect partition, and that being the case to be a co sharer in an undivided mahal, cannot be an essential of the right of pre-emption For the above reasons I hold that the plaintiffs, on the right interpretation of the wajib ul arz of 1272 Fasli, notwith standing a perfect partition, are, as sharers in the village, entitled to pre empt The result is that I would dismiss the appeal with costs.

BY THE COURT —The appeal is dismissed with costs

Appeal dismissed

1911
July 13

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.

MOHSIN ALI (DECREE-HOLDER) *v.* MASUM ALI (JUDGEMENT-DEBTOR).*

Civil Procedure Code (1908), section 48—Execution of decree—Limitation—Execution prevented by fraud of judgement-debtor.

Upon a correct interpretation of clause 2 of section 48 of the Code of Civil Procedure (1908), the effect of the proviso embodied in that clause is that the bar to execution created by the first clause of the same section is removed for a period of twelve years from any date on which the judgement-debtor has by fraud prevented the execution of the decree. *Sreenath Gooho* v. *Yusoof Khan* (1) dissented from.

THIS was an appeal arising out of an application for execution of a decree passed on the 8th of June, 1891. In the year 1906 there was an application for execution by arrest of the judgement-debtor, and in the course of these proceedings it was found that the judgement-debtor had by fraud prevented the execution of the decree at various times within twelve years immediately before the date of the application then in question. In the present case also the question raised was whether execution of the decree was barred under section 48 of the Code of Civil Procedure, 1908. It was held by both the courts below that section 48 applied and the application was accordingly dismissed. The decree-holder appealed to the High Court.

Pandit *Sham Kishan Dar*, for the appellant.

Babu *Satya Chandra Mukerji*, for the respondent.

KNOX and PIGGOTT, JJ.:—This is a second appeal in an execution case arising out of a decree passed on the 8th of June, 1891. The question to be decided is whether the application for execution out of which this appeal arises is or is not barred by the provisions of section 48 of the Code of Civil Procedure. We find that in the year 1906 there was an application for execution by arrest of the judgement-debtor, in connection with which the dispute between the parties was carried up to this Court in second appeal. The finding of the Additional Subordinate Judge in his judgement, dated the 6th June, 1907, which was affirmed by this Court on appeal, was to the effect that that

* Second Appeal No. 413 of 1911 from a decree of H. W. Lyle, District Judge of Agra, dated the 16th of January, 1911, confirming a decree of Raja Ram, Munsif of Agra, dated the 29th of July, 1912.

(1) (1881) I. L. R., 7 Calc., 556.

1911

MOHSIN ALI v MASUM ALI

application was not barred by the provisions of section 48 afore said, because the judgement debtor had by fraud prevented execution of the decree at various times within twelve years immediately before the date of the application then in question Those dates are set forth in the judgement itself, and the last date there given is the 10th of June, 1904, when a warrant for arrest of this judgement-debtor was applied for, and the finding is that the judgement debtor was guilty of fraud in that he successfully evaded arrest We are of opinion that upon a correct interpretation of clause 2 of section 48 of the Code of Civil Procedure, the effect of the proviso embodied in that clause is that the bar to execution created by the first clause of the same section is removed for a period of twelve years from any date on which it is held that the judgement debtor has by fraud prevented the execution of the decree We have been referred to a ruling to the contrary in the case of *Sreenath Gooho* v *Yusoof Khan* (1) But it seems to us that the learned Judge who decided that case has not given due effect to the words "Nothing in this section shall be deemed" at the beginning of clause 2, section 48 of the Code of Civil Procedure We are, accordingly of opinion that this appeal must prevail and that the orders of both the courts below must be set aside and the learned Munsif directed to restore the application for execution to his file and endeavour to execute the warrant of arrest applied for by the decree holder If, as the learned Judge seems to think, there is reason to suspect that the decree holder has applied for this warrant of arrest without serious intent of getting it executed, it should be easy enough for the court to deal with such tactics on his part The application has been dismissed merely on the ground that it is barred under the provisions of section 48 of the Code of Civil Procedure and in that opinion we are unable to concur The appellant will get his costs of these proceedings

Appeal allowed

(1) (1881) I L. R., 7 Calc., 556

1911
July 14

Before Mr. Justice Sir George Knox and Mr. Justice Piggott.

ABDULLAH KHAN AND ANOTHER (PLAINTIFFS) *v.* MUSAMMAT BUNDI AND OTHERS (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act), section 41—Ostensible owner—Owners of the property minors at the date of transfer—Act (Local) No. II of 1901 (Agra Tenancy Act), section 201.

The owner of certain zamindari property died leaving him surviving a widow and two minor sons. During the minority of the sons their mother not only got herself recorded in respect of one third of the property left by the husband (her proper share being one-eighth and the balance being her sons'), but she mortgaged it to one N. N. sold his rights to R. who brought a suit for sale on his mortgage and having brought the property to sale purchased it himself. He subsequently transferred it to M. M. brought a suit for profits against the sons and got an *ex parte* decree. *Held* on suit by the sons for declaration of title to their share in the property excluding the one-eighth belonging to their mother or in the alternative for possession (1) that the suit was not barred by the provisions of section 41 of the Transfer of Property Act, 1882, and (2) that the proviso to section 201 of the Agra Tenancy Act, 1901, protected the present suit. *Dilbai* v. *Gopal* (1) and *Damlar Singh* v. *Jaswant Kunwar* (2) referred to.

THE facts of this case were as follows:—

One Nasib Khan died about the year 1890, possessed of a share in mauza Taprana. He left surviving him a widow Musammat Bundi, and two sons, who are the plaintiffs appellants now before us. According to the Muhammadan law, Musammat Bundi would inherit a one eighth share in the landed property left by Nasib Khan, and the sons would take the remainder in equal shares. The appellants were minors at the time of their father's death, and during their minority Musammat Bundi not only got herself recorded as proprietor of a one third share but proceeded in 1892 to mortgage the same to one Nihal. The latter sold his rights to one Rura Mal, who is a respondent in this case. He brought a suit on the mortgage and, having obtained a decree, brought this one-third share to sale and purchased it himself. He subsequently sold to Mohib-ullah Khan who is the second respondent. Mohib-ullah Khan, on the 1st of September, 1908, brought a suit for profits on account of this one third share. This suit was not resisted by the present appellants and resulted in

* Second Appeal No. 1365 of 1910 from a decree of C. E. Guiterman, Additional Judge of Meerut, dated the 14th of September, 1910, confirming a decree of Kameshwar Nath, Munsif of Kairana, dated the 16th of June, 1910.

(1) (1901) I. L. R., 25 Bom., 433. (2) (1907) I. L. R., 29 All., 293.

an *ex parte* decree in favour of Mohib ullah Khan The plaintiffs then sued to establish their right in respect of five twenty-fourths share of the property left by Nasib Khan, being the difference between the one eighth share which passed to Musammat Bundi by right of inheritance and the one third share, which she mortgaged in 1892

The court of first instance (Munsif of Kairana) dismissed the suit, and this decree was affirmed in appeal by the Additional District Judge of Meerut The plaintiffs appealed to the High Court

Maulvi *Muhammad Ishaq*, for the appellants

Mr *C Ross Alston* for the respondents

KNOX and PIGGOTT JJ —*This was a suit for a declaration* that the plaintiffs appellants be declared proprietors of a certain share in mauza Taprana or in the alternative be awarded possession of the same It appears that one Nasib Khan died somewhere about the year 1890, possessed of a share in the village in question He left surviving a widow, Musammat Bundi, and two sons, who are the plaintiffs appellants now before us According to the Muhammadan law, Musammat Bundi would inherit a one eighth share in the landed property left by Nasib Khan, and the sons would take the remainder in equal shares The appellants were minors at the time of their father's death, and during their minority Musammat Bundi not only got herself recorded as proprietor of a one third share but proceeded in 1892 to mortgage the same to one Nihal The latter sold his rights to one Rura Mal, who is a respondent in this case He brought a suit on the mortgage and having obtained a decree, brought this one third share to sale and purchased it himself He subsequently sold to Mohib ullah Khan, who is the second respondent now before us Mohib ullah Khan, on the 1st of September, 1908, brought a suit for profits on account of this one third share This suit was not resisted by the present appellants and resulted in an *ex parte* decree in favour of Mohib ullah Khan By the present suit the plaintiffs seek to establish their right in respect of a five twenty fourths share of the property left by Nasib Khan, being the difference between the one eighth share which passed to Musammat Bundi by right of inheritance and the

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one third share, which she mortgaged in 1892. The courts below have dismissed the suit on two grounds only. First, they have held that the decision in the suit for profits operates as *res judicata* so as to bar this suit under the provisions of section 11 of the Code of Civil Procedure; secondly, they have held that the respondent, Mohib-ullah Khan, is protected by the provisions of section 41 of the Transfer of Property Act. In our opinion the suit ought not to have been dismissed on either of these grounds. The plaintiffs were minors at the time of their father's death, and at the time of the mortgage in favour of Nihal which constitutes the original transfer lying at the root of the respondent's title. Under these circumstances it cannot be said that Musammat Bundi was the ostensible owner of this one third share with the consent, express or implied, of the present plaintiffs. Authority for this proposition may be found in *Dalibai* v. *Gopi Bai* (1) and in *Dambar Singh* v. *Jawitri Kunwar* (2). With regard to the question of *res judicata* we do not find it necessary to determine the question of the effect of the Revenue Court's decree on the ground of the same having been passed *ex parte*. It is sufficient for us to say that the plaintiffs in our opinion are clearly protected by the proviso to clause (3) of section 201 of the Agra Tenancy Act II of 1901. At the time when he filed his suit for profits, Mohib-ullah Khan was not a recorded co-sharer, but he had applied for mutation some months before and mutation of names was effected in his favour while the suit for profits was pending and before it had been decided. On the principle laid down by the Full Bench of this Court which recently considered this question, it is clear that, even if that suit for profits had been defended by the present appellants, Mohib-ullah could have obtained a decree in that court on the basis of the record in his name in the revenue papers on his proving that his name had been so recorded at any time before the decision of the suit. The *ex parte* decree passed against the present plaintiffs cannot put them in a worse position than they would have occupied if they had resisted the suit and the suit had been determined against them on proof that Mohib-ullah Khan, during the pendency of the suit, became a recorded co-sharer. It follows

(1) (1902) I. L. R., 26 Bom., 433 (4 C) (2) (1907) I. L. R., 29 All., 292 (294)

that the present suit is protected by the proviso at the end of clause 3) of section 201 of the Tenancy Act We, therefore, accept this appeal and setting aside the decrees of both the courts below, decree the plaintiff s claim for a declaration to the extent already stated, with costs throughout

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ABDULLAH KHAN v. MUSAMMAT BUNDI

Appeal allowed

FULL BENCH

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Before the Hon ble Mr H G Richards Chief Justice Mr Justice Banerji and Mr Justice Tudball

BHOLA NATH (PLAINTIFF) *v* MUSAMMAT KISHORI AND ANOTHER (DEFENDANTS) *

Civil Procedure Code (1908) *section* 60 (1) (*c*) – *Execution of decree – Mortgage – Agriculturist s house not appurtenant to his holding*

Held by RICHARDS C J and TUDBALL J (BANERJI J *dissentiente*) that section 60 of the Code of Civil Procedure will not operate to bar the sale of a house belonging to an agriculturist in execution of a decree on a mortgage of the same if such house is not an appurtenance of the mortgagor s holding which he is prohibited by law from mortgaging or transferring

Per BANERJI J —The Legislature clearly intended that no court should sell a house belonging to and occupied by an agriculturist provided that the house is of the description mentioned in clause *c* of the proviso to section 60 Code of Civil Procedure and it makes no difference in the powers of the court whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged The proviso forbids both attachment and sale that is where an attachment must precede a sale it forbids attachment as well as sale and where attachment is not a preliminary step it forbids sale *Ram Dial* v *Narpat Singh* (1) referred to

THE facts of this case were as follows –

One Gaya, the deceased husband of Musammat Kishori, and another person, Jaisukh, mortgaged to the plaintiff a portion of a dwelling house for Rs 99 The mortgage was dated the 8th July, 1909 Gaya died childless The plaintiff brought this suit against Kishori and Jaisukh for payment of mortgage money with interest and in default for the sale of the house The defendant took up the plea that the house being an agriculturist's house could not be brought to sale The Munsif dismissed the suit holding the mortgage to be invalid, but he found that it had been genuinely entered into The Subordinate Judge affirmed

* Second Appeal No 1194 of 1910 from a decree of Srish Chandra Basu Subordinate Judge of Bareilly dated the 14th July 1910 confirming a decree of Baijnath Das Munsif of Havali dated the 4th of April 1910

(1) (1909) I. L R., 33 All., 136

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(1) (1902) I L R, 26 Bom, 433 (437) (2) (1907) I L R, 29 All, 292 (294)

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that the present suit is protected by the proviso at the end of clause 3) of section 201 of the Tenancy Act We, therefore, accept this appeal and setting aside the decrees of both the courts below, decree the plaintiff's claim for a declaration to the extent already stated, with costs throughout

Appeal allowed

FULL BENCH

1911
July 20

Before the Hon'ble Mr H G Richards Chief Justice Mr Justice Banerji and Mr Justice Tudball

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Per BANERJI J —The Legislature clearly intended that no court should sell a house belonging to and occupied by an agriculturist provided that the house is of the description mentioned in clause *c* of the proviso to section 60 Code of Civil Procedure and it makes no difference in the powers of the court whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged The proviso forbids both attachment and sale that is where an attachment must precede a sale it forbids attachment as well as sale and where attachment is not a preliminary step it forbids sale *Ram Dial* v *Narpat Singh* (1) referred to

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(1) (1909) I L R, 33 All, 136

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the decision, on the ground that an agriculturist's house could not be sold, and as six years had expired since date of mortgage, he dismissed the suit altogether The plaintiff appealed to the High Court

Munshi *Iswar Saran*, for the appellant, referred to order XXXIV, rules 4 and 5, as governing mortgage suits Section 60 of the new Code did not apply to decrees obtained on a mortgage Properties exempted therein were only saved from sale when attachment was necessary That group of sections was headed 'attachment' and only related to sales in execution of money decrees Besides, there was nothing to prevent a tenant selling or mortgaging his house of his own accord Where a heading was given to a group of sections, it controlled their interpretation, Wilberforce on Interpretation, page 294 If a tenant could sell the materials of his house he could mortgage them, *Bhagvandas* v *Hathibhai* (1)

Babu *Balram Chandra Mukerji* [for Maulvi *Ghulam Mujtaba*], for the respondents —

The court should not help the plaintiff to bring the house to sale It would be necessary to hold that section 60 had nothing to do with mortgage decrees The words in the proviso were 'attachment or sale,' '*sale*' there included sales after attachment or otherwise, *Tilak Ram* v *Bachailal* (2), *Ram Dial* v *Narpat Singh* (3)

Munshi *Iswar Saran*, in reply —

In the proviso the expression 'attachment or sale' was governed by the use of the word '*such*' preceding it If the mortgage itself were invalid the mortgagor would not incur any personal liability either Act V of 1908 mainly dealt with procedure, and such an Act could not override a substantive right and that by implication only

RICHARDS, C J —This appeal arises out of a suit for sale on a mortgage The property consisted of a house, and it has been found that the mortgagors to whom the house belonged were agriculturists Both the courts below have dismissed

(1) (1879) I L R 4 Bom, 25 (2) (1909) 6 A L J R, (Notes of cases) 107
(3) (1903) I L R, 25 All, 126

the suit on the strength of section 60 of the Code of Civil Procedure

It is to be borne in mind that it is no found that the house in question was an appurtenance of a tenancy which the tenant was incapable of mortgaging or transferring This is a very important matter, because the question might be very different if the mortgage had been a mortgage of the house of an occupancy tenant which was found to be appurtenant to the holding The sole question for us to decide is whether or not having regard to the provisions of section 60 of the Code of Civil Procedure the courts below were correct in dismissing the plaintiff's suit

Section 60 (1) is as follows —"The following property is liable to attachment and sale in execution of a decree, namely, lands, houses * * * Provided that the following particulars shall not be liable to such attachment or sale, namely —

"(a) The necessary wearing apparel, cooking vessels, beds and bedding of the judgement debtor, his wife and children, and such personal ornaments, as in accordance with religious usage, cannot be parted with by any woman,

"(b) tools of artizans, and where the judgement debtor is an agriculturist, his implements of husbandry and such cattle and seed grain as may, in the opinion of the court, be necessary to enable him to earn his livelihood as such, and such portion of agricultural produce or of any class of agricultural produce as may have been declared to be free from liability under the provisions of the next following section,

"(c) houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to an agriculturist and occupied by him"

The argument on behalf of the respondents is that by virtue of the proviso the house of the defendants cannot be sold, and that inasmuch as the house cannot be sold in execution of the decree, no mortgage decree ought to be made

On the other hand the appellant argues that section 60 does not apply to mortgage decrees at all, that it deals entirely with attachment and sale in respect of simple money decrees

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Richards C.J

In my judgement the decision of the courts below were incorrect *Prima facie* a man is entitled to mortgage his property if he pleases, and if he can make a valid mortgage, the mortgagee is entitled to a mortgage decree entitling him to sell the property The only aspect in which the decree of the court below can be supported is on the ground that the proviso to section 60 by implication enacts that the mortgage of a house of an agriculturist is illegal Such a contention in my opinion cannot be sustained The Code of Civil Procedure is an Act which deals entirely with matters of procedure, and *prima facie* it is very improbable that the Legislature intended to deal with matters of substantive law Where it was considered necessary for the protection of certain classes of tenants that their powers of transfer should be restricted, the Legislature by express provisions in the Tenancy Act has so enacted It seems to me also that it would be a very strained construction to give to section 60 to hold that it applied to the execution of mortgage decrees The section itself is headed "attachment" In the case of mortgage decrees no attachment is necessary and in practice no attachment is ever made The section begins —"The following property is liable to attachment and sale in execution of a decree" It seems quite clear that these words only apply to simple money decrees Then follows the proviso, where it is true that the words are not "attachment *and* sale," but "attachment *or* sale" It must, however, be remembered that the proviso is a proviso to section 60, clause 1, which deals with simple money decrees The words "such attachment or sale" also appear in the proviso, clearly showing that the proviso relates to what immediately precedes It is argued that the word "or" appearing in the proviso, instead of the word "and" necessarily shows that the section relates to mortgage decrees I do not agree with this argument There are cases of simple money decrees in which it is not necessary that there should be an attachment, namely, when there has been already an attachment prior to judgement or on foot of another decree Further more in the explanation the very same words "attachment or sale" appear, where it is quite clear that reference is being made to the execution of a simple money decree of a particular nature, namely, a simple money decree for rent

In my opinion we would not be justified in holding that it was intended by the proviso to section 60 to render the sale or mortgage of the house of an agriculturist illegal If it was not so intended, the mortgagor was entitled to mortgage his house, and the mortgagee, under the provisions of order XXXIV, rules 4 and 5, was entitled to a decree for sale, and I think that he would be entitled to execute this decree for sale notwithstanding the provisions of section 60 (1) (c) of the Code of Civil Procedure I would allow the appeal

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BANERJI, J —I regret I cannot agree with the learned Chief Justice I see no reason to alter the opinion I expressed in my judgement in the case of *Ram Dial* v *Narpat Singh* (1), decided by the late Chief Justice and myself, and subsequently followed by me in *Gulzari Lal* v *Bhikari* (2) The court below must be taken to have found that the house which the plaintiff seeks to bring to sale is a house belonging to an agriculturist and occupied by him within the meaning of clause (c) of the proviso to section 60 (1) of the Code of Civil Procedure If the Legislature forbids the sale of such a house, a court cannot by its decree order that a house of that description should be sold In my opinion the law forbids the sale of such a house Section 51 (b) provides that a court may order execution of a decree by attachment and sale, or by sale without attachment of any property Section 60 of the Code specifies the different classes of property which are liable to attachment where attachment is necessary, and to sale The proviso to the section is to the effect that certain particulars, among which are houses and other buildings belonging to and occupied by an agriculturist, shall not be liable to attachment or sale At the commencement of the section the word "and" is used and in the proviso we find the word "or" The proviso, as I understand it, forbids both attachment and sale, that is to say, where an attachment must precede a sale, it forbids attachment as well as sale, and where it is not necessary that an attachment should be a preliminary step to a sale, it forbids sale Therefore, in my opinion, section 60 and the proviso to it take away from the court the power to order a sale of property of the description mentioned in the proviso

(1) (1900) I L R 33 All., 136 (2) (1911) 8 A L J., Notes of Cases, 38

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Bhola Nath v. Muhammad Kasim.

Richards, C.J.

In my judgement the decision of the courts below were incorrect. *Primâ facie* a man is entitled to mortgage his property if he pleases, and if he can make a valid mortgage, the mortgagee is entitled to a mortgage decree entitling him to sell the property. The only aspect in which the decree of the court below can be supported is on the ground that the proviso to section 60 by implication enacts that the mortgage of a house of an agriculturist is illegal. Such a contention in my opinion cannot be sustained. The Code of Civil Procedure is an Act which deals entirely with matters of procedure, and *primâ facie* it is very improbable that the Legislature intended to deal with matters of substantive law. Where it was considered necessary for the protection of certain classes of tenants that their powers of transfer should be restricted, the Legislature by express provisions in the Tenancy Act has so enacted. It seems to me also that it would be a very strained construction to give to section 60 to hold that it applied to the execution of mortgage decrees. The section itself is headed "attachment". In the case of mortgage decrees no attachment is necessary and in practice no attachment is ever made. The section begins :—"The following property is liable to attachment and sale in execution of a decree." It seems quite clear that these words only apply to simple money decrees. Then follows the proviso, where it is true that the words are not "attachment and sale," but "attachment *or* sale." It must, however, be remembered that the proviso is a proviso to section 60, clause 1, which deals with simple money decrees. The words "such attachment or sale" also appear in the proviso, clearly showing that the proviso relates to what immediately precedes. It is argued that the word "or" appearing in the proviso, instead of the word "and" necessarily shows that the section relates to mortgage decrees. I do not agree with this argument. There are cases of simple money decrees in which it is not necessary that there should be an attachment, namely, when there has been already an attachment prior to judgement or on foot of another decree. Furthermore, in the explanation the very same words "attachment or sale" appear, where it is quite clear that reference is being made to the execution of a simple money decree of a particular nature, namely, a simple money decree for rent

In my opinion we would not be justified in holding that it was intended by the proviso to section 60 to render the sale or mortgage of the house of an agriculturist illegal If it was not so intended, the mortgagor was entitled to mortgage his house and the mortgagee, under the provisions of order XXXIV, rules 1 and 5, was entitled to a decree for sale, and I think that he would be entitled to execute this decree for sale notwithstanding the provisions of section 60 (1) (c) of the Code of Civil Procedure I would allow the appeal

BANERJI, J —I regret I cannot agree with the learned Chief Justice I see no reason to alter the opinion I expressed in my judgement in the case of *Ram Dial v Narpat Singh* (1), decided by the late Chief Justice and myself, and subsequently followed by me in *Gulzari Lal v Bhikari* (2) The court below must be taken to have found that the house which the plaintiff seeks to bring to sale is a house belonging to an agriculturist and occupied by him within the meaning of clause (c) of the proviso to section 60 (1) of the Code of Civil Procedure If the Legislature forbids the sale of such a house, a court cannot by its decree order that a house of that description should be sold In my opinion the law forbids the sale of such a house Section 51 (b) provides that a court may order execution of a decree by attachment and sale, or by sale without attachment of any property Section 60 of the Code specifies the different classes of property which are liable to attachment where attachment is necessary, and to sale The proviso to the section is to the effect that certain particulars, among which are houses and other buildings belonging to and occupied by an agriculturist, shall not be liable to attachment or sale At the commencement of the section the word "and" is used and in the proviso we find the word "or" The proviso, as I understand it, forbids both attachment and sale, that is to say, where an attachment must precede a sale, it forbids attachment as well as sale, and where it is not necessary that an attachment should be a preliminary step to a sale, it forbids sale Therefore, in my opinion, section 60 and the proviso to it take away from the court the power to order a sale of property of the description mentioned in the proviso

(1) (1909) I L. R. 33 All., 136 (2) (1911) 8 A. L J., Notes of Cases, 33

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Bhola Nath v. Musammat Hasnoni.

Banerji J.

The object of the Legislature is manifest. That object is that certain classes of debtors should be protected against their own improvidence. There can be no doubt that in the case of a simple decree for money the dwelling house occupied by an agriculturist cannot be sold. The policy of the law is that he should not be deprived of his place of residence by a process of court. I fail to see why, if an unsecured creditor of the agriculturist cannot proceed against the debtor's dwelling house, a secured creditor should be allowed to do so. The policy of the law equally applies to both the cases. In my opinion the Legislature clearly intended that no court should sell a house belonging to and occupied by an agriculturist provided that the house is of the description mentioned in clause (c) of the proviso to section 60, and it makes no difference in the powers of the court whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged. I think that the use of the disjunctive "or" in the proviso is very significant, and that it leaves no room for doubt as to the intention of the Legislature. The Code of Civil Procedure no doubt lays down the procedure to be followed in the case of attachments or sales. One of the rules on the subject is that the dwelling house of an agriculturist should not be sold, and that rule a court is bound to follow. To hold that such a house can in some cases be sold will be departing from the prescribed procedure and defeating the policy of the law. For these reasons I am of opinion that, as the court cannot order a sale of property of the description in question it cannot make a decree directing such sale and the decision of the courts below is right. I would dismiss the appeal.

Tudball, J.—I am in full agreement with the learned Chief Justice and have practically nothing to add to what he has said. Presuming that the agriculturist in the circumstances of the present case has a legal right to sell or mortgage his house, it not being appurtenant to a class of holding which is non transferable according to law, I fail to see how in justice equity, or good conscience, a court can refuse to grant to the mortgagee a decree for sale. It seems to me as clear as possible that section 60 of the Code of Civil Procedure does not, and was never intended to apply to the case of a mortgage decree for the execution of which

provision is made elsewhere than in that section It seems to me to be going much too far to hold that section 60 of the Civil Procedure Code destroys the right of a man to make a mortgage of his property, for it practically amounts to that to say that his mortgagee is not entitled to a decree for sale on the basis of a mortgage which would otherwise be perfectly legal and valid I think stress must be placed upon the fact that in the present case there is nothing to show that the house in question is appurtenant to the mortgagor's holding, or to show what the nature of that holding is I say this by reason of the decision in *Ram Dial* v *Karpat Singh* (1) That case was decided upon two grounds With one I fully agree, but the other is the subject of discussion in this present case and I cannot accept it For these reasons I would admit the appeal

BY THE COURT —The order of the Court is that the appeal be allowed, the decrees of both the courts below be set aside and the case remanded to the court of first instance, through the lower appellate court, with directions to re admit it in its original number in the register and determine it according to law The parties will abide their own costs in this court Other costs will follow the event

Appeal allowed

(1) (1909) I L R 33 All., 106.

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Banerji J.

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Appeal allowed

(1) (1909) I L R, 33 All, 1?6.

Before the Hon'ble Mr H G Richards Chief Justice Mr Justice Banerji and Mr Justice Tudball

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RA GAM LAL AND ANOTHER (PLAINTIFFS) v JHANDU (DEFENDANT)*

Civil Procedure Code (1908) order XLI rule 33—Appeal—Procedure Power of appellate court to interfere with portion of decree not challenged by either party

Plaintiff sued defendant for rent and obtained a decree for a portion of his claim Plaintiff then appealed against the disallowance of the balance of the amount claimed but defendant submitted to the decree and neither filed a cross appeal nor took objections under order XLI rule 22 of the Code of Civil Procedure 1908

Held that it was not competent to the appellate court acting under order XLI rule 33 to interfere with the decree obtained by plaintiff in so far as it had not been challenged by defendant *Attorney General* v *Simpson* (1) referred to

THE facts of this case were as follows —

The plaintiffs brought a suit against the defendant for rent of a holding and claimed Rs 291 7 0 The defendant alleged that the claim had been discharged The Assistant Collector gave the plaintiffs a decree for Rs 95 11 11 and dismissed the rest of their claim The plaintiffs appealed with respect to the portion of their claim dismissed by the first court The defendant submitted to the order in so far as it was against him, nor did he file any objections under order XLI, rule 22, in the plaintiffs' appeal The District Judge remitted certain issues to the first court and on return of the findings he dismissed the entire suit of the plaintiffs holding that he had power to do so under order XLI, rule 33, even though the defendant had not appealed against that part of the decree which was against him The finding of the first court on remand was that a certain sum had been paid twice over The plaintiffs appealed to the High Court

Dr *Tej Bahadur Sapru* for the appellants —

When the Legislature enacted order XLI, rule 33 it was not intended to do away with the provisions of order XLI, rule 22, which required that objections should be filed by the respondent if he meant to challenge any part of the decree within a certain

* Second Appeal No 79 of 1911 from a decree of D L Johnston District Judge of Meerut dated the 23rd of September 1910 reversing a decree of [illegible] Prasad Assistant Collector first class of Meerut dated the 23rd of March 1910

(1) [1901] 2 Ch. D. 671.

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1911

RANGAM LAL v JHANDU

Munshi *Mangal Prasad Bhargava*, for the respondent, relied on *Bikramjit Singh* v *Husaini Begam* (2)

RICHARDS, C J, and BANERJI and TUDBALL, JJ —This appeal arises out of a suit brought by a zamindar against a tenant for rent The rent claimed was the sum of Rs 294 7-0 The defence was that the claim had been discharged The Assistant Collector, who tried the case in the first instance, found that the defendant was entitled to certain credits, but that there was a balance due of Rs 96 11 11, for which he gave a decree The plaintiff appealed against the decree in so far as it dismissed any part of his claim The defendant submitted to the decree He neither filed a cross appeal nor objections, as provided by order XLI, rule 22 of the Code of Civil Procedure On appeal the learned District Judge referred certain issues It would rather appear that he was influenced by certain matters which either were not before the court of first instance or were not urged in that court These issues in substance involved a retrial by the court of first instance of the very issues which that court had already decided The result, however, of the findings was that the learned District Judge considered that the plaintiff's claim had been fully discharged, and he consequently in exercise of what he considered to be the powers conferred upon him by order XLI, rule 33, dismissed the plaintiff's suit *in toto*

(1) [1901] 2 Ch D., 671 (2) (1881) I L R., 3 All, 613

1911

BISHAN LAL v. JHANDU

The plaintiff comes here in second appeal and contends that the learned District Judge was not justified under the circumstances in making such a decree

The question is one of considerable importance, because rule 33 of order XLI is a new rule introduced into the Code of Civil Procedure for the first time in 1908 The rule is as follows —

"The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order that case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection

Illustration

A claims a sum of money as due from him by X or Y and in a suit against both obtains a decree against X X appeals and A and Y are respondents The appellate court decides in favour of X It has power to pass a decree against Y

The words are no doubt very wide, but we think that care and judicial discretion must be used by appellate courts in the exercise of the powers conferred by the rule In a proper case the court, of course, is quite entitled and should not hesitate to exercise them It is not easy, nor perhaps expedient, to lay down any hard and fast rule We think, however, that one principle may be safely stated The courts in the exercise of the powers conferred by order XLI, rule 33, should not lose sight of the other provisions of the Code of Civil Procedure itself, nor of the Court Fees Act nor of the Law of Limitation In particular it should bear in mind the case stated by way of illustration at the foot of the rule Rule 22 of the same order provides — "Any respondent, though he may not have appealed from any part of the decree may not only support the decree on any of the grounds decided against him before the court below, but take any cross objection to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the

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(1) [1901] 2 Ch D, 671 (2) (1881) I L R, 3 All, 643

1911
July 21

Before the Hon ble Mr H G Richards Chief Justice Mr Justice Banerji and Mr Justice Tudball

RANGAM LAL AND ANOTHER (PLAINTIFFS) *v* JHANDU (DEFENDANT)*

Civil Procedure Code (1908) *order XLI rule 33—Appeal—Procedure Power of appellate court to interfere with portion of decree not challenged by either party*

Plaintiff sued defendant for rent and obtained a decree for a portion of his claim Plaintiff then appealed against the disallowance of the balance of the amount claimed but defendant submitted to the decree and neither filed a cross appeal nor took objections under order XLI rule 22 of the Code of Civil Procedure 1908

Held that it was not competent to the appellate court acting under order XLI rule 33 to interfere with the decree obtained by plaintiff in so far as it had not been challenged by defendant *Attorney General* v *Simpson* (1) referred to

THE facts of this case were as follows —

The plaintiffs brought a suit against the defendant for rent of a holding and claimed Rs 294 7 0 The defendant alleged that the claim had been discharged The Assistant Collector gave the plaintiffs a decree for Rs 96 11 11 and dismissed the rest of their claim The plaintiffs appealed with respect to the portion of their claim dismissed by the first court The defendant submitted to the order in so far as it was against him, nor did he file any objections under order XLI, rule 22, in the plaintiffs' appeal The District Judge remitted certain issues to the first court and on return of the findings he dismissed the entire suit of the plaintiffs holding that he had power to do so under order XLI, rule 33, even though the defendant had not appealed against that part of the decree which was against him The finding of the first court on remand was that a certain sum had been paid twice over The plaintiffs appealed to the High Court

Dr *Tej Bahadur Sapru*, for the appellants —

When the Legislature enacted order XLI, rule 33, it was not intended to do away with the provisions of order XLI, rule 22, which required that objections should be filed by the respondent if he meant to challenge any part of the decree within a certain

* Second Appeal No 79 of 1911 from a decree of D L Johnston District Judge of Meerut dated the 23rd of September 1910 reversing a decree of Mahesh Prasad Assistant Collector first class of Meerut dated the 23rd of March 1910

(1) [1901] 2 Ch. D 671

1911

RANGAN LAL v JHANDU

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(1) [1901] 2 Ch D, 671 (2) (1881) I L R, 3 All, 613

1911

RANGAM LAL v JHANDU

The plaintiff comes here in second appeal and contends that the learned District Judge was not justified under the circumstances in making such a decree

The question is one of considerable importance, because rule 33 of order XLI is a new rule introduced into the Code of Civil Procedure for the first time in 1908 The rule is as follows —

"The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order that case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection

Illustration

A claims a sum of money as due from him by X or Y and in a suit against both obtains a decree against X X appeals and A and Y are respondents The appellate court decides in favour of X It has power to pass a decree against Y

The words are no doubt very wide, but we think that care and judicial discretion must be used by appellate courts in the exercise of the powers conferred by the rule In a proper case the court, of course, is quite entitled and should not hesitate to exercise them It is not easy, nor perhaps expedient, to lay down any hard and fast rule We think, however, that one principle may be safely stated The courts in the exercise of the powers conferred by order XLI, rule 33, should not lose sight of the Cour^er provisions of the Code of Civil Procedure itself, nor of D Court Fees Act nor of the Law of Limitation In particular would bear in mind the case stated by way of illustration at intende^pot of the rule Rule 22 of the same order provides — which re respondent, though he may not have appealed from any if he mea the decree may not only support the decree on any of ——nds decided against him before the court below, but take objection to the decree which he could have taken by ppeal, provided he has filed such objection in the ourt within one month from the date of service on ol er of notice of the day fixed for hearing the

* Second … Judge of M… Mahesh Pras… March 1910

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1911

RANGAM LAL v JHANDU

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Illustration

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Second Judge of Me Mahesh Prasa March 1910

appeal or within such further time as the appellate court may see fit to allow"

This rule clearly shows that it was intended that, *prima facie* at least, a respondent should not be allowed to take exception to so much of a decree as was against him without complying with the provisions of the rule

In a case in which there is no sufficient reason for a respondent neglecting either to appeal or to file objections, we think the court should hesitate before allowing him to object at the hearing of the appeal filed by the appellant The object of rule 33 is manifestly to enable the court to do complete justice between the parties to the appeal Where, for example, it is essential in order to grant relief to an appellant that some relief should at the same time be granted to the respondent also, the court may grant relief to the respondent, although he has not filed an appeal or preferred an objection Of such cases the illustration to the rule is a type In the supposed case the appellate court could not do justice to the appellant without doing injustice to the respondent unless it was enabled to make a decree against "Y"

The rule itself is for the most part taken from order LVIII, rule 4, of the rules of the Supreme Court of Judicature in England The case of the *Attorney General* v *Simpson* (1) is another illustration of the class of cases which calls for the exercise of the powers conferred by rule 33 That was a case in which an action was brought on behalf of the public for a declaration that the public were entitled to use certain locks on the river Ouse without payment of tolls A further declaration was claimed that the defendant was under an obligation to repair, and keep in repair the locks The court of first instance made a decree declaring that the public were entitled to use the locks without payment of tolls, but it, at the same time, contrary to the plaintiff's claim, declared that the defendant was under no obligation to repair the locks The Court of Appeal found that the public were not entitled to use the locks without payment of tolls to the defendant At the same time they were of opinion that the defendant was under an obligation to repair the locks

(1) [1901] L. R., 2 Ch. D, 671

1911

RANGAM LAL
v
JHANDU

The plaintiff, however, not unnaturally, had taken no exception to that part of the declaration of the court of first instance which absolved the defendant from the obligation to keep the locks in repair The Court of Appeal felt that they were justified, while declaring that the public were liable to pay tolls, to declare that the defendant was liable to keep the locks in repair, notwithstanding that no appeal or objection had been taken to that part of the decree by the plaintiff

In our opinion the dismissal by the learned District Judge of the plaintiff's suit in its entirety was not a proper exercise by him of the powers conferred by order XLI, rule 33 If the defendant was aggrieved by the decree against him for Rs 96, there was no reason why he should not have appealed or filed objections

We accordingly allow the appeal, set aside the decree of the lower appellate court and restore the decree of the court of first instance We decree that the parties shall pay their own costs in this Court The defendant respondent will have his costs in the lower appellate court

Appeal allow

1911
July 21

Before the Hon ble Mr H G Richa ds Chief Justice Mr Justice Banerji and Mr Justice Tudball

MUHAMMAD SHARIF AND ANOTHER (PLAINTIFFS) v BANDE ALI AND OTHERS (DEFENDANTS)

Act No 1 of 1872 (Indian Evidence Act) section 108—Evidence—Presumption of death—Burden of proof

Held that the presumption which it is permissible to make under section 108 of the Indian Evidence Act 1872 does not go further than the mere fact of death If the period which has elapsed since the time that the person whose death is in question was last heard of is more than seven years there is no presumption that such person died during the first period of seven years and not at any subsequent period

Dharup Nath v *Gobind Saran* (1) discussed *In re Phene s Trusts* (2) *Narayan Bhagwant* v *Shrinivas Trimbak* (3) *Fani Bhushan Banerji* v *Surjya Kanta Roy Chowdhry* (4) and *Srinath Das* v *Probodh Chunder Das* (5) referred to

* Second Appeal No 67 of 1911 from a decree of C Rustomji District Judge of Allahabad dated the 14th of September 1910 confirming a decree of Pirthwi Nath Subordinate Judge of Allahabad dated the 2nd of March 1910

(1) (1886) I L R 8 All 614
(2) (1869) L R 5 Ch A 139
(3) (1905) 8 Bom L R 216
(4) (1907) I L R 35 Calc 25
(5) (1910) 11 C L J 580

1911

MUHAMMAD SHARIF v BANDE ALI

THE facts of this case were as follows —

One Madad Ali mortgaged certain property to the father of the defendants respondents, on two occasions, first on 18th January, 1887, and again on 27th May, 1890 Madad Ali disappeared sometime after and nothing was heard of him again His brother, Dildar Ali, died five to seven years ago On his death the plaintiffs appellants, who were heirs of Dildar, sought to redeem the mortgages made by Madad Ali They alleged that as Madad Ali disappeared some 18 years ago, he must be presumed to have been dead for the last eleven years, and Dildar, who was alive till a later date, must be deemed to have succeeded him as heir The defendants took the plea that Dildar died first, and so did not come in at all The first court and the lower appellate court found that Dildar died 7 years ago, but that there was no evidence as to when Madad Ali died

Babu *Piari Lal Banerji* (for Munshi *Haribans Sahai*), for the appellants —

A presumption arose on the expiry of seven years that Madad was dead, and it was for the other side to prove that he was alive after that date There was no presumption as to when he died during those seven years If the suit had been brought immediately after the seven years had expired, the other side would have had to prove his existence—why should the burden be shifted now that a longer time had elapsed, *Dharup Nath* v *Gobind Saran* (1) He referred to *In re Phene s Trusts* (2) He also relied on a decision of KARAMAT HUSAIN, J, in S A 486 of 1909 He discussed *Fani Bhushan Banerji*, v *Surjya Kanta Roy Choudhry* (3) and *Narayan Bhagwant* v *Shriniwas Trimbal*, (4)

Babu *Bilram Chandra Mukerji* for Dr *Satish Chandra Banerji* (Mr *Zafar Mehdi* with him) for the respondents, referred to *Srinath Das* v *Probodh Chunder Das*, (5)

RICHARDS, C J —This appeal arises out of a suit in which the plaintiffs sought to redeem two mortgages It was necessary in order that they should succeed in their suit that they should

(1) (1886) I L R. 8 All 614
(2) (1869) L. R 5 Ch A., 139
(3) (1908) I L R., 35 Calc., 25
(4) (1906) 8 Bom. L. R., 22
(5) (1910) 11 C L J 580

1911

MUHAMMAD SHARIF v BANDE ALI

Richard, C J

establish that they were the heirs of one Madad Ali They proved that they were the heirs of Dildar Ali, and Dildar Ali would have been one of the heirs of Madad Ali provided that he had survived him The defence was that Dildar Ali predeceased Madad Ali The court below finds that Dildar Ali died seven or eight years ago The plaintiffs gave evidence which went to show that Madad Ali had not been heard of for some seventeen or eighteen years by persons who would naturally have heard of him if he had been alive Beyond this they were able to give no affirmative evidence that Madad Ali was dead Upon these facts the plaintiffs claim that they are entitled to succeed They rely upon the provisions of section 108 of the Evidence Act, which is as follows —

'Provided that when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is shifted to the person who affirms it

They contend that it must be presumed that Madad Ali died some time during the first seven years during which, according to the evidence he was not heard of, and that upon the expiry of the first seven years it must be presumed that he was dead

In my opinion this contention is not correct The mere fact that the evidence adduced by the plaintiffs went to show that Madad Ali had not been heard of for more than seven years raises no greater presumption of his death than if the evidence had been confined to the exact period of seven years In other words the only presumption is that Madad Ali is dead There is no presumption that he died in the first seven years or in the last seven years The presumption merely is that he was dead at the time the question whether he was alive or dead arose, the burden of showing that he was alive being thrown upon the defendants if it was necessary for them to do so

The plaintiffs rely on the case of *Dharup Nath* v *Gobind Saran* (1) It was decided in that case that the presumption which the plaintiffs contend for did arise With all respect to the learned judge who delivered the judgement in the case, I think that he misinterpreted and misunderstood the passage from Taylor on Evidence which he quotes The period of seven years which the learned author there speaks of, is in my opinion,

(1) (1886) I. L. R., 8 All., 614

1911

MUHAMMAD SHARIF v BANDE ALI

Richards C J

the minimum period during which it is necessary for the plaintiff to show that the person whose life or death is in question has not been heard of, and that if the evidence shows the person had not been heard of for 14 or 15 years instead of seven, the presumption would not be carried one bit further There would be merely the presumption that the man was dead, but there would be no presumption that he died at any particular moment of the period during which he has not been heard of In the last edition of Taylor on Evidence the passage is as follows —"although, however, a person who has not been heard of for 7 years is presumed *to be dead*, the law raises no presumption as to the time of his death, and if any one seeks to establish the precise period during those seven years at which some person died, he must do so by actual evidence" It is said that the anomalous position is created that if Dildar had sued during his lifetime, he would have succeeded, and that now his heir is not entitled to succeed It seems to me that this argument proceeds upon the assumption that if Dildar had sued during his lifetime, the evidence as to the disappearance of Madad Ali would have been exactly the same This would be a very rash assumption Seven or eight years ago there must have been many persons who might have heard of the existence of Madad Ali who are now dead and gone

Reliance was also placed upon the case *In re Phene's Trusts* (1) In that case the question was whether or not Nicholas Phene Mill had survived his uncle who died on the 5th of January, 1861, leaving certain property by will to his nephews in equal shares Nicholas Phene Mill was one of his nephews SIR G M GIFFARD, L J, examined the authorities upon the question of presumption and finally decided that it lay upon the administrator of Nicholas Phene Mill to show by affirmative evidence that the latter had survived his uncle At page 151 the Lord Justice says —

It is a general well founded rule that a person seeking to recover property must establish his title by affirmative proof This was one of the grounds of decision in *Doe* v *Nepean* and to assert as an exception to the rule that the *onus* of proving death at any particular period either within the seven years or otherwise should be with the party alleging death at such particular period and

(1) (1869) L R 5 Ch A., 139

1911

MOHAMMAD SHARIF v BANDE ALI

Richard C J

not with the person to whose title that fact is essential is not consistent with the judgement of the present Lord Chancellor when Vice Chancellor in *In re Green s Settlement* or with the *dictum* of Lord Justice ROLT when he said in *In re Benham s Trusts* that the question was one not of presumption but of proof or with the real substance of the actual decisions or the sound parts of the reasoning in *Doe* v *Napean* or with the judgements in *Rex* v *Inhabitants of Harborne* and *Reg* v *Lumley* or with the principles to be deduced from the judgement in *Underwood* v *Wing* The true proposition is that those who found a right upon a person having survived a particular period must establish the fact affirmatively by evidence; the evidence will necessarily differ in different cases but sufficient evidence there must be or the person asserting title will fail

In my opinion these remarks apply with equal force to the case where it is essential for the plaintiff's claim that he should establish the death of an individual at a particular period

Lastly, the appellants relied upon the judgement of KARAMAT HUSAIN, J, in the case of *Musammat Akbari-un nissa* v *Syed Bashir Ali* (1) With great respect I think the learned Judge fell into the same error as the Judges who decided the case of *Dharup Nath* v *Gobind Saran*, and that he also misunderstood the judgement in Phene s Trusts case

The view I take was taken in the case of *Narayan Bhagwant* v *Shriniwas Trimbak* (2) and in the case of *Fani Bhushan Banerji* v *Surjya Kanta Roy Chowdhry* (3) This last ruling was cited with approval in the case of *Srinath Das* v *Probodh Chunder Das* (4) MOOKERJEE, J, says at page 585 —

"The only presumption which is enacted by section 107 of the Indian Evidence Act is that the party is dead at the time of the suit but there is no presumption as to the precise time of his death

In my opinion there can be no doubt whatever that on the true construction of section 108 of the Evidence Act it lay upon the plaintiffs to show by affirmative evidence that Dildar Ali survived Madad Ali Having failed to do so, the suit could not succeed I would dismiss the appeal

BANERJI, J —I am of the same opinion The case turns upon the construction of section 108 of the Indian Evidence Act Under that section there is no doubt a presumption that a person who has not been heard of for seven years should be deemed to be dead, but there is no presumption as to the time of

(1) S A No 486 of 1909
(2) (1905) I L R 8 Bom 226
(3) (1907) I L R 35 Calc 25
(4) (1910) 11 C L J 580

his death The true construction of the section has, in my opinion, been correctly laid down in the note to section 108 in Ameer Ali and Woodroffe's edition of the Evidence Act The learned authors say —

1911

MUHAMMAD SHARIF v BANDE ALI

The rule is the same whether only seven years or more than seven years have elapsed There is no presumption either as to the time of death within the period of seven years or that the person died at conclusion of the period * * * The only presumption enacted by the section is that the party is dead at the time of suit but there is no presumption in any case as to the time of his death

The weight of authority to which reference has been made by the learned Chief Justice is in support of this view, and I do not think that I can profitably add anything to what he has said I agree in the order proposed

TUDBALL, J —I concur

BY THE COURT —The order of the Court will be that the appeal is dismissed with costs

Appeal dismissed

APPELLATE CIVIL

1911
July 27

Before Mr Justice Banerji and Mr Justice Piggott

KHUB CHAND (DEFENDANT) v HARMUKH RAI AND ANOTHER (PLAINTIFF)

Act No IX of 1908 (Indian Limitation Act) section 12—Limitation—Time requisite for obtaining copy—Application for copy made on date the court closed for annual vacation—Notice posted during vacation—Copy received after vacation

Where an application for copies of a judgement and decree was made on the day when the court rose for its annual vacation it was *held* that the applicant was entitled to the benefit of the whole period of the vacation notwithstanding that the copying department was kept open for some days and a notice posted during the vacation that the applicant s copies were ready

THE facts of this case were as follows —

The decision of the first court in a certain case was dated the 30th of September 1909 The appellant applied for a copy of the judgement and decree on the 13th of October, 1909 On the latter date the subordinate courts closed for the annual vacation

Second Appeal No 406 of 1910 from a decree of H M Smith Additional Judge of Aligarh dated the 4th of March 1910 confirming a decree of Banke Behari Lal Additional Subordinate Judge of Aligarh dated the 30th of September 1909

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Khub Chand v Harsukh Rai

and did not re open till the 17th of November, 1909 Under the special orders of the District Judge the copying department continued working during the earlier days of the vacation, and accordingly a notice to the effect that the copy required by the appellant was ready, was posted on the notice board of the court on the 18th of October, 1909 The copy was actually received by the appellant on the 29th of November, 1909, and his petition of appeal was presented to the lower appellate court on the 1st of December, 1909 The District Judge dismissed the appeal as time barred The appellant appealed to the High Court urging that he was entitled to the benefit of the whole period of the vacation, notwithstanding the notice above referred to

Munshi *Gulzari Lal*, for the appellant

Mr *Abdul Raoof* and Dr *Tej Bahadur Sapru*, for the respondents

BANERJI and PIGGOTT, JJ —This is a defendant s appeal, and the only point for determination is whether the lower appellate court was justified in dismissing the appeal presented before it by the same defendant, on the ground that it was barred by limitation The decision of the first court in the case was dated the 30th of September, 1909 This defendant applied for a copy of the judgement and decree on the 13th of October, 1909 On that same date the courts below closed for the annual vacation, and did not re open until the 17th of November, 1909 It appears that under the special orders of the District Judge the copying department continued working during the earlier days of the vacation, presumably in order to make up arrears Under these circumstances a notice to the effect that the copy required by the defendant, Khub Chand, was ready, was posted on the notice board of the court on the 18th of October, 1909 The copy was actually received by Khub Chand on the 29th of November, 1909, and his petition of appeal was presented to the lower appellate court on the 1st of December, 1909 The question we have to determine is what is to be considered the period requisite for obtaining necessary copies in this case We have it on the affidavit of the appellant, which was not controverted, that he did not actually receive notice that his copy was ready before the date on which the copy was made over to him, namely, the

29th of November, 1909 We have only to consider, therefore, whether he was bound to have taken cognizance of the notice posted on the notice board of the court on the 18th of October, 1909, at a time when the court was closed on account of the annual vacation We are of opinion that the appellant should not be considered bound to have taken cognizance of that notice until the date the courts re opened after the vacation, that is, until the 17th of November, 1909 We hold, therefore, that the period requisite for obtaining the copy in this case extended from the 13th of October to the 17th of November, 1909, and if this period be excluded under the provisions of section 12 of the Limitation Act, the appeal was within time when presented to the lower appellate court on the 1st of December, 1909 We, accordingly, allow this appeal, set aside the order and decree of the lower appellate court and remand the case to that court with directions to re admit the appeal under its original number in the register and to dispose of it according to law Costs here and hitherto will abide the event

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KHUB CHAND v HARMUKH RAI

Appeal allowed—Cause remanded

Before Mr Justice Tudball and Mr Justice Piggott

1911 July 29

KULDIP DUBE (PLAINTIFF) v MAHAUL DUBE AND OTHERS (DEFENDANTS)*

Award—Act No 1 of 1877 (Specific Relief Act) section 30—Specific performance—Suit to recover money payable under an award—Act No IX of 1908 (Indian Limitation Act) schedule 1 articles 113 116, 120—Limitation

By the terms of an award it was provided *inter alia* that the defendants should pay to the plaintiff the sum of Rs 350 on or before the 27th of June 1904 and in default of such payment the plaintiff could recover from the defendants Rs 350 with interest at 12 per cent per annum.

Held that a suit to recover on default of payment by the stipulated date, the sum abovenamed with interest was not a suit for specific performance of a contract and as such governed by article 113 of the first schedule to the Indian Limitation Act 1908 but was governed by either article 116 or article 120

Sukho Bibi v *Ram Sukh Das* (1) *Raghubar Dial* v *Madan Mohan Lal* (2), *Sheo Narain* v *Beni Madho* (3) *Sornavalli Ammal* v *Muthayya Sastrigal* (4)

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* Second Appeal No 146 of 1911 from a decree of Guru Prasad Dube Second Additional Judge of Gorakhpur dated the 21st of November 1910 confirming a decree of Lal Gopal Mukerji city Munsif of Gorakhpur dated the 20th of March 1909

(1) (1883) I L. R., 5 All. 263
(2) (1893) I. L. R., 16 All., 3
(3) (1901) I. L. R., 23 All., 285
(4) (1900) I. L. R., 23 Mad., 593

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KULDIP DUBE v MAHAUL DUBE

Talewar Singh v *Bahori Singh* (1) and *Bhajahari Saha Baniya* v *Behary Lal Basak* (2) referred to

BY an award dated the 12th of January, 1904, it was provided, amongst other things, that one party should pay to the other the sum of Rs 350 on or before the 27th of June, 1904 and in default of such payment being made the party to whom it was due was entitled to recover the same with interest at the rate of 12 per cent per annum The present suit was to recover this sum of Rs 350 with interest, as well as other moneys alleged to be due under the terms of the award As regards the sum of Rs 350 the court of first instance (city Munsif of Gorakhpur) held that its recovery was barred by article 113 of the first schedule to the Indian Limitation Act, 1908, and on appeal this finding was upheld by the additional District Judge The plaintiff thereupon appealed to the High Court

Mr *M L Agarwala*, for the appellant

Munshi *Gobind Prasad*, for the respondents

TUDBALL and PIGGOTT, JJ —The parties to this suit are members of one and the same family On the 9th of January, 1904, they executed an agreement by which they submitted various differences which had arisen between them to the arbitration of one Phullu Dube and on the 12th of January, 1904, the arbitrator delivered an award which was signed by the parties in token of their acceptance This award contained a number of provisions regarding the family property and the debts due on the same, but we are now concerned only with one provision according to which the defendants (strictly speaking Dudhnath father of the first three defendants and grand father of the fourth) was bound to pay Rs 350 to the plaintiffs by the 27th of June, 1904 In default of such payment it was provided by the award that the plaintiffs should be entitled to recover this amount with interest at 12 per cent per annum The suit is one for recovery of this amount with interest, as well as for other moneys alleged to be due to the plaintiffs in consequence of the provisions of the award The court of first instance went into the whole question of accounts between the parties and finally decreed the plaintiff Kuldip Dube a sum

(1) (1904) I. L. R. 26 All. 497 (2) (1906) I. L. R. 33 Calc. 881

of Rs 125 8 0 with proportionate costs and future interest at 6 per cent per annum on account of certain payments made in accordance with provisions contained in the award in satisfaction of certain family debts, but dismissed the claim for Rs 350 and interest as barred by limitation The plaintiff appealed, and there was a cross objection by the defendants regarding an other item in the account The court of first appeal, the learned Additional Judge of Gorakhpur, affirmed the decision of the first court, and the plaintiff, Kuldip Dube, comes to this court in second appeal His memorandum raises a small question as to costs, which was not pressed in argument and which will practically be disposed of by the order we propose to pass as to the costs of the suit as a whole The one question for determination before us is whether the claim for Rs 350 and interest in accordance with the provisions of the award of the 12th of January, 1904, is or is not barred by limitation This money was payable on or before the 27th of June, 1904, and this suit was instituted in the court of first instance on the 8th of February 1909 The contention on behalf of the defendants, which has found favour in both the courts below, is that the period of limitation applicable is three years, in accordance with article 113 of the second schedule to the Indian Limitation Act If the suit can in fact be regarded as one "for specific performance of a contract" within the meaning of the said article, it should presumably have been brought within three years of the date fixed for the payment of the money, namely, the 27th of June, 1904 On the other hand, the plaintiff appellant contends before us that the suit is either governed by article 116 (for compensation for the breach of a contract in writing registered), or is one falling under article 120 of the same schedule, as being a "suit for which no period of limitation is provided elsewhere" In either case the suit would fall within a six years' period of limitation and would be well within time

We have been referred to a number of cases on the subject

In *Sukho Bibi* v *Ram Sukh Das* (1) and again in *Raghubar Dial* v *Madan Mohan Lal* (2) it was held, in each case by two Judges of this court, that a suit for the recovery of a balance of

(1) (1883) I. L. R., 5 All. 263 (2) (1893) I. L. R., 1[illegible] All. [illegible]

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[illegible] Dube v. [illegible] Dube

money due under the terms of an award is virtually a suit for the specific enforcement of the award and is therefore subject to the limitation prescribed by article 113 of the second schedule to the Indian Limitation Act of 1877. The point was discussed at some length in the latter of these two judgements, and the decision turns upon an express finding that the suit then before the court was not one for compensation for the breach of a contract. These cases were considered by a bench of this court in Sree [illegible] v. Beni Madho (1). That was a suit for recovery of possession over immovable property. The learned Judges held that the mere fact that such a suit was brought upon a title established by a certain award would not make it a suit for specific performance. They did not find it necessary to dissent from the two other rulings of this court already referred to, but it is clear that they doubted them, for they relied upon a Madras case—[illegible] v. Muthappa Mudaliyar (2), in which those rulings are distinctly dissented from. A later case of our own court is that of Jawahir Singh v. Bishan Singh (3). The facts of this case are worth noting because [illegible]. It appears that certain matters in dispute between the parties had been referred to arbitration and that the arbitrator delivered an award in accordance with a compromise entered into by the parties themselves. The award directed amongst other things that one party should transfer certain immovable property to the other, and the suit was by one of the parties concerned for recovery of the property directed to be conveyed. It was held that this was a suit for specific performance of a contract within the meaning of article 113 of the second schedule of the Indian Limitation Act. The plaintiff based his claim not on his [illegible] title to the property which he claimed; what he possessed under the terms of the award was a right to compel the opposite party to give him a valid title [illegible]. Such a suit was properly a suit for 'specific performance' in the strict sense of the word. It does not [illegible] on the fact that the award before the court was based upon a compromise entered into [illegible]

(1) [illegible] (2) [illegible]
(3) [illegible]

by the parties and might therefore be held to partake in a special sense of the nature of a contract It would seem, however, that they accepted the position taken up in the older rulings of this court that, by reason of the operation of section 30 of the Specific Relief Act (Act I of 1877), a suit for the specific performance of the terms of an award should be regarded as a suit for the specific performance of a contract within the meaning of article 113 of the schedule to the Limitation Act In any case the principle underlying the decision is that an award is the outcome of a contract to refer to arbitration and that the Legislature has seen fit to limit suits for the specific performance of a contract to a period of three years, even though such contract be in writing registered, and though a longer period would have been allowed for a suit in which the plaintiff confined himself to seeking damages for breach of the terms of the registered contract The Calcutta High Court had occasion to consider the older rulings of this court in the case of *Bhajahari Saha Banikya* v *Behary Lal Basak* (1) The remarks of MOOKERJEE, J , at pages 885 and 886 of the report are of great interest He doubted the correctness of the Allahabad decisions on the ground that there was nothing in section 30 of the Specific Relief Act, which necessarily placed awards on the same footing as contracts for purposes of limitation , but he admitted the general principle that " the jurisdiction of the court in enforcing the specific performance of the provisions of an award is founded on the principle that the award is the outcome of a contract to refer to arbitration," and he did not base his dissent from the broad proposition laid down in *Sukho Bibi* v *Ram Sukh Das* entirely on that ground He pointed out that, when a court orders the defendant to pay money to the plaintiff which the former ought to have paid under the terms of an award but had not paid, the court is not really enforcing specific performance at all, but is directing payment of compensation for non compliance with the terms of the award

It seems to us that this remark is peculiarly apposite to the facts of the case now before us and furnishes the true basis for the decision of the same All that section 30 of the Specific Relief Act lays down is that when the question is one of specific

(1) (1906) I L R, 33 Calc 881

performance, the court has the same powers, and should proceed upon the same principles, in the case of an award as in the case of a contract The way to consider the question then is to take the terms of the award before the court and to see whether, if these same terms had been embodied in a contract between the parties, the suit before the court is or is not one in which specific performance of those terms is claimed and ought to be decreed In the present case the terms were that the defendants should pay the plaintiff Rs 350 on or before the 27th of June 1904 The defendants failed to do so, and the plaintiff claims that, under a further provision contained in the document itself, he is entitled to recover Rs 350 with interest at 12 per cent per annum Had the same suit been brought with reference to a contract in writing registered which embodied the same terms, no one would have dreamt of describing the suit as one for specific performance of the contract It would clearly be a suit for compensation for breach of contract in a case in which the penalty for such breach was prescribed by the contract itself (*vide* sections 73 and 74 of the Indian Contract Act), and it would be subject to a limitation period of six years under article 116 of the schedule to the Indian Limitation Act We are, therefore, clearly of opinion that the suit before us is not one for specific performance at all, and that article 113 of the schedule to the Indian Limitation Act does not apply We do not think that we are precluded from arriving at this decision by the older rulings of this court to which reference has been made In the first place, those rulings have been distinguished, and their authority shaken, by the later rulings of this court which we have also considered In the second place, it is not necessary for us to determine the broad question whether or not a suit to enforce the specific performance of the provisions of an award is a "suit for the specific performance of a contract" within the meaning of article 113 aforesaid In so far as this proposition appears to be laid down by rulings of this court, we leave it undisturbed We say the suit before us is not a suit for specific performance at all, and this must be a question to be determined in each case upon the pleading set forth in the plaint taken in connection with the terms of the award or other document upon which the plaintiff's suit is based

Nor is it necessary for us to determine whether article 116 or article 120 of the schedule to the Indian Limitation Act governs this case If the correct view be that an agreement to refer a matter to arbitration is in effect a contract to do whatever the arbitrator shall direct, it may be that the suit before us is a suit for compensation for breach of contract, and is governed by article 116 becau o based upon a registered instrument Otherwise, it is a suit of a nature for which provision is not elsewhere made and must be referred to the provisions of article 120 In either case the period of limitation is the same, and the suit is within time

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KULDIP DUBE v MAHAUL DUBE

We accordingly set aside the decrees of both the courts below, and give the plaintiff a decree for a further sum of Rs 543 10 0 in addition to the sum of Rs 125 8 0 awarded by the first court The plaintiff will get his costs in this court In the lower appellate court the defendants respondents should bear the costs of their cross objections which were dismissed , otherwise the parties will pay and receive costs in both the courts below in proportion to failure and success The decree will carry interest at 6 per cent per annum from the date of the first court's decision as directed in the decree of the said court

Appeal allowed

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July 29

Before Mr Justice Tudball and Mr Justice Piggott

SALIG RAM AND ANOTHER (PLAINTIFFS) v CHAHA MAL (DEFENDANT) *

Act No IX of 1872 (*Indian Contract Act*) *section* 212—*Principal and agent —Suit for compensation for loss caused by negligence of agent—Jurisdiction— Civil Procedure Code* (1908) *section* 20(*c*)

The plaintiffs who were grain dealers ordered the defendant, who was a commission agent at Karachi to purchase some grain for them The latter did so and the plaintiffs sent him some money on account In accordance with the direction of the plaintiffs the railway receipt for the goods purchased was sent by value payable post By some mischance it did not arrive The defendant instructed the railway authorities not to deliver the goods till the balance due to him was paid The balance was paid by the plaintiffs to the defendant s agent at Delhi The Railway officials at Hathras refused to deliver the goods without the defendant s consent and d lay occurred In the meantime the price of the particular kind of grain fell and the speculation resulted in a loss to the

* First Appeal No 7 of 1911 from an order of H M Smith Additional Judge of Aligarh dated the 23rd of September 1910

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performance, the court has the same powers, and should proceed upon the same principles, in the case of an award as in the case of a contract The way to consider the question then is to take the terms of the award before the court and to see whether, if these same terms had been embodied in a contract between the parties, the suit before the court is or is not one in which specific performance of those terms is claimed and ought to be decreed In the present case the terms were that the defendants should pay the plaintiff Rs 350 on or before the 27th of June 1904 The defendants failed to do so, and the plaintiff claims that, under a further provision contained in the document itself, he is entitled to recover Rs 350 with interest at 12 per cent per annum Had *the same suit been brought with reference to a contract in writing* registered which embodied the same terms, no one would have dreamt of describing the suit as one for specific performance of the contract It would clearly be a suit for compensation for breach of contract in a case in which the penalty for such breach was prescribed by the contract itself (*vide* sections 73 and 74 of the Indian Contract Act), and it would be subject to a limitation period of six years under article 116 of the schedule to the Indian Limitation Act We are, therefore, clearly of opinion that the suit before us is not one for specific performance at all, and that article 113 of the schedule to the Indian Limitation Act does not apply We do not think that we are precluded from arriving at this decision by the older rulings of this court to which reference has been made In the first place, those rulings have been distinguished and their authority shaken, by the later rulings of this court which we have also considered In the second place, it is not necessary for us to determine the broad question whether or not a suit to enforce the specific performance of the provisions of an award is a "suit for the specific performance of a contract" within the meaning of article 113 aforesaid In so far as this proposition appears to be laid down by rulings of this court, we leave it undisturbed We say the suit before us is not a suit for specific performance at all, and this must be a question to be determined in each case upon the pleading set forth in the plaint taken in connection with the terms of the award or other document upon which the plaintiff's suit is based.

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Nor is it necessary for us to determine whether article 116 or article 120 of the schedule to the Indian Limitation Act governs this case If the correct view be that an agreement to refer a matter to arbitration is in effect a contract to do whatever the arbitrator shall direct, it may be that the suit before us is a suit for compensation for breach of contract, and is governed by article 116 because based upon a registered instrument Otherwise, it is a suit of a nature for which provision is not elsewhere made and must be referred to the provisions of article 120 In either case the period of limitation is the same, and the suit is within time

We accordingly set aside the decrees of both the courts below, and give the plaintiff a decree for a further sum of Rs 543 10 0 in addition to the sum of Rs 125 8 0 awarded by the first court The plaintiff will get his costs in this court In the lower appellate court the defendants respondents should bear the costs of their cross objections which were dismissed , otherwise the parties will pay and receive costs in both the courts below in proportion to failure and success The decree will carry interest at 6 per cent per annum from the date of the first court's decision as directed in the decree of the said court

Appeal allowed

Before Mr Justice Tudball and Mr Justice Piggott

1911 *July, 20*

SALIG RAM AND ANOTHER (PLAINTIFFS) v CHAHA MAL (DEFENDANT) *

Act No IX of 1872 (*Indian Contract Act*) *section* 212—*Principal and agent —Suit for compensation for loss caused by negligence of agent—Jurisdiction— Civil Procedure Code* (1908) *section* 20(*c*)

The plaintiffs who were grain dealers ordered the defendant, who was a commission agent at Karachi to purchase some grain for them The latter did so and the plaintiffs sent him some money on account In accordance with the direction of the plaintiffs the railway receipt for the goods purchased was sent by value payable post By some mischance it did not arrive The defendant instructed the railway authorities not to deliver the goods till the balance due to him was paid The balance was paid by the plaintiffs to the defendant s [illegible] at Delhi The Railway officials at Hathras refused to deliver the goods [illegible] the defendant s consent and delay occurred In the meantime the pr[illegible] particular kind of grain fell and the speculation resulted in a [illegible]

* First Appeal No 7 of 1911 from an order of H M [illegible] Judge of Aligarh dated the 23rd of September 1910

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plaintiffs *Held* on suit by the plaintiffs for compensation instituted at Hathras that the case was for compensation under section 212 of the Contract Act in respect of the direct consequences of the defendant s neglect and misconduct, and that the cause of action arose at Karachi and the suit therefore did not lie in the court at Hathras

THE facts of this case were as follows —

The plaintiffs, who were grain dealers at Hathras, on the 30th December, 1910, telegraphed to the defendant, who was a commission agent at Karachi, ordering two wagon loads of *juar* to be sent at once to Hathras They sent 600 rupees by telegram and another 600 rupees by means of a hundi The *juar* was despatched on the 2nd of January, 1911, and reached Hathras on the 12th of January The railway receipt was, on the plaintiff's instructions, sent value payable for the balance due to the defendant, but for some reason it was not delivered to the plaintiff s and, owing to instructions given by the defendant to the railway authorities, the grain was not delivered to the plaintiffs until the 8th of February, 1911 Meanwhile the price of juar had fallen and the speculation resulted in a loss The plaintiffs sued for compensation due on account of the alleged negligence of the defendant, and instituted the suit at Hathras The court of first instance (additional Munsif of Hathras) decreed the claim in part On appeal by the defendant the additional Judge of Aligarh held that the court at Hathras had no jurisdiction and ordered the plaint to be returned for presentation to the proper court Against this order the plaintiffs appealed to the High Court

Mr *A H C Hamilton*, for the appellants

Munshi *Girdhari Lal Agarwala*, for the respondent

TUDBALL and PIGGOTT JJ —The plaintiffs appellants are residents of Hathras in the Aligarh district where they deal in grain The defendant is a commission agent doing business at Karachi The former brought the present suit in the court of the Munsif at Hathras (it was subsequently transferred to the court of the Additional Munsif of Aligarh) on the following allegation of fact —In the end of December, 1910, grain being very dear at Hathras, they inquired by telegram from the defendant the price at which *juar* was selling at Karachi The defendant wired the rate on the 27th

of December, 1910 On the 30th, December, 1910, they wired to him an order to purchase two waggon loads of *juar* at once and to despatch the same by rail to Hathras They wired to him on the same day Rs 600, and also sent him a *hundi* for Rs 600 On the same date the defendant wired to say that he had purchased 500 maunds of *juar* On the 2nd of January 1911, the defendant wired to say that the goods had been despatched They actually arrived at Hathras on the 12th of January After receipt of the telegram of the 2nd of January the plaintiffs wrote to the defendant telling him to send the railway receipt and invoice to them by value payable post for the amount which might still be due to him He, however, failed to send the railway receipt, but on the 16th of January he sent a post card stating that he had sent it V P P for Rs 310 7 0, and that they should pay this amount and take the receipt No receipt arrived (Here we may note that it had been duly sent V P P, but owing to some error either in the address or on the part of the post office had not been delivered) Correspondence followed The defendant ordered the railway authorities not to deliver the goods (He had not then received payment of the balance due) On the 25th of January the plaintiffs paid the amount to the defendant by handing it over to an agent of his at Delhi The Railway officials at Hathras refused to deliver without the defendant's consent and further delay occurred and the goods were not delivered until February 8th In the mean time the price of the grain at Hathras fell and the speculation resulted in a loss to the plaintiffs This loss they ascribe to defendant's *negligence and misconduct in (1) not sending* the railway receipt as ordered, (2) in ordering the railway authorities at Karachi not to deliver the goods, (3) in still delaying to order the delivery after the payment made on the 25th of January to his agent at Delhi

Among other defences with which we have no concern, the defendant pleaded that the court at Aligarh had no jurisdiction to try the suit The first court held that it had and partly decreed the claim The lower appellate court held that the courts in Hathras had no jurisdiction and ordered the plaint to be

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returned for presentation in the proper court Hence the present appeal

The sole question for decision is, whether the cause of action in whole or in part arose at Hathras, *vide* section 22(c) of the Code of Civil Procedure, which applies to the facts of the present case The case is clearly one for compensation under section 212 of the Contract Act in respect of the direct consequences of the defendants' neglect and misconduct as alleged The latter was the appellants' agent, and it was his duty to purchase the grain at Karachi, to place it on the railway at Karachi, and despatch it to the plaintiff's address, and he was then directed to post the rail way receipt and send it V P P to the plaintiffs When the trouble arose it will be seen from the correspondence detailed in the first court's judgement that he ordered the railway authorities at Karachi not to deliver the goods as he had not received payment Finally, after the money had been paid on the 25th of January, he was asked by letter to order the said railway authority at Karachi to wire instructions to Hathras to make delivery In this also he is said to have made delay

It is thus quite clear that the defendant's neglect or miscon duct or both, took place, if at all, at Karachi In the course of the transaction he had nothing to do outside Karachi He had not contracted to deliver at Hathras, but merely to place the goods on the rails at Karachi and to post the railway receipt there also We fail to see that the cause of action, i e the defendant's alleged neglect or misconduct which resulted in loss, occurred anywhere else but at Karachi It is urged that the resultant loss or damage occurred at Hathras, and that the negligence and misconduct plus the resultant loss constitute the whole cause of action, and that, therefore, the cause of action partly arose in Hathras

It is quite clear that under section 17 (a), read with explana tion III, of Act XIV of 1882, the present suit would not have been within the jurisdiction of the Hathras court The contract was made at Karachi, where the plaintiff's offer was accepted The performance of the contract had to be completed at Karachi and the money due was payable at Karachi The defendant contracted to act as the plaintiff's agent at Karachi for the purpose

of purchasing and despatching the goods and to do certain acts there also His negligence or misconduct, if any, occurred there

The language of the section has been altered in the present Act in that in place of the words "The cause of action arises" and Explanation III of section 17 the words "The cause of action in whole or in part arises" have been substituted This has not in our opinion altered the law as to what is the cause of action in suits arising out of contract Explanation III of section 17, Act XIV of 1882, though it does not appear in the present Act, is a correct statement of what the law still is and shows clearly the true meaning of the words "cause of action" in the case of suits arising out of contracts

In our opinion, therefore, the cause of action in the present suit arose wholly at Karachi and the lower appellate court's order was sound We therefore dismiss the appeal with costs

Appeal dismissed

Before the Hon ble Mr H G Richards Chief Justice and Mr Justice Banerji

1911 July 31

MUHAMMAD NAZIR KHAN (PLAINTIFF) v MAKHDUM BAKHSH AND ANOTHER (DEFENDANTS)*

Pre-emption—Muhammadan law—Ta'ab-i mawasibat

Where a person immediately on hearing of the sale of a house exclaimed '*mera hak shafa hai* and without any delay took the price and brought it to the vendee and claimed the house *held* that the expressions used by him coupled with the circumstances constituted a sufficient first demand *Muhammad Abdul Rahman Khan* v *Muhammad Khan* (1) distinguished

THIS was an appeal under section 10 of the Letters Patent from a judgement of KARAMAT HUSAIN, J The facts of the case are fully stated in the judgement under appeal, which was as follows —

This was a suit for pre-emption on the basis of the Hanafi Law and the question to be decided is whether the expressions used by the pre-emptor in making the *talab-i mawasibat* do or do not amount to a claim for pre-emption. The first court came to the conclusion that they did not The lower appellate court came to the conlusion that they did and decreed the suit. The defendant comes here in second appeal and his learned counsel contends that the expressions used by the pre-emptor are not sufficient to constitute the first demand The lower appellate court in its judgement remarks as follows 'In the present case the words used were *mera shafa* repeated twice. The plaintiff

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* Appeal No 47 of 1911 under section 10 of the Letters Patent.

(1) (1903) 8 A. L. J. 270

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MUHAMMAD NAZIR KHAN v. MAKHDUM BAKHSH

also asked those present to bear witness to it He then immediately went inside the house brought the money and being accompanied by witnesses went to the vendee offered him the money and made the second demand. The words uttered at the first demand amply and clearly show that the plaintiff had a clear intention of demanding hi right *vide* Weekly Notes 1897 pp 23 and 9? 6 A L J R, 15'

"The Hanafi Law on the question of first demand is very clear Some expression showing that the pre-emptor claims pre-emption must be used. The expression used in the present case as found by the lower court is *mera shafa* which only gives an information that the pre-emptor has the right to pre empt There is nothing in the expression to show that in addition to the information given by him, he claims to pre-empt A pre-emptor may say I am a pre-emptor but I do not claim to pre-empt or he may say I am a pre-emptor and I claim to pre-empt The fact that the expression I am a pre-emptor may be used together with a claim to pre-empt as well as with a waiver of that claim conclusively shows that the expression I am a pre-emptor does not in any way convey the idea that the pre-emptor does claim to pre-empt The point is covered by an unreported decision of this Court in S A 1059 of 1901, decided on the 1st of December 1903 and I quote the following extract from the judgement — As to the decision of the case upon the principles of Muhammadan Law we find ourselves driven to the conclusion that no right has been acquired by the plaintiff under that law We cannot find that merely for the plaintiff to say " I am a pre-emptor my right extends to the land constitutes a *talab-i mowasiba* either by express terms or by implication. There is abundance of authority upon the subject It is immaterial according to the Hedaya in what words the claim is preferred It is sufficient that they indicate a claim. But we have nothing in the expressions used in this case to make it possible to say that such a claim has been made or can be inferred. Mr Justice AMEER ALI in his work upon Muhammadan Law Vol. I p 597 following the past authorities says — If a pre-emptor were to say to the purchaser I am thy pre-emp or or *shafee* it would be void ' The result of this is clear that a mere expression or declaration of his right does not itself show that he wishes to enforce that right We find ourselves constrained to overrule the claim of the pre-emptor appellant and hold that the first demands necessary under the Muhammadan law have not been made

"In addition to the authorities cited in the unreported case I cite the following from Baillie's Muhammadan law — There is some difference as to the words in which the demand should be expressed But the better opinion is that it is lawful in any words that intelligibly express the demand So that if the pre-emptor should say I have demanded or I demand pre-emption it would be lawful but if he were to say I am thy *shafee* or pre-emptor ' or I take thy mansion by pre-emption it would be void. (Book on Pre-emption, Chapter III p 457 edit on 2)

"There is nothing technical in this rule of Muhammadan law It is based on the canons of interpretation which determine the intention of a person intention is to be gathered from expressions used by that person and not from words which have not been used by him. The expression 'I am a pre-emptor'

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only gives information that the speaker is a pre emptor not of what the pre emptor is going to do—but the words I have demanded ' or 'I do demand pre emption show an intention to *claim* pre emption

The case *Ihsanul Huq* v *Kallan* (1) has no application to the facts of the present case because according to the remarks made by the learned Judges in that case it appears that a demand was made The learned Judges say — The plaintiff in his evidence states that as soon as he heard of the purchase from a friend he at once said I am a pre-emptor I have a claim (*main shafi hun mera haq hai*) The words the plaintiff used were probably equivocal but a witness named Abdul Ghafur was called and he says that when the plaintiff was informed that the house was sold he at once said that he was a pre emptor and would take the house and told Nanhe his brother to take money and asked us to accompany him. The rulings in *Ahmad Shah Khan* v *Abadi B gam* (2) and *Muhammad Yunis Khan* v *Muhammad Yusuf* (3) do not apply to the facts of these cases

The result is that I hold that the expression found by the lower appellate court to have been used by the pre emptor *mera shafa* does not constitute a *talab mawasibat* within the meaning of that expression under the Muhammadan law I therefore allow the appeal set aside the decree of the lower appellate court and restore that of the court of first in tance with costs '

Mr *Muhammad Ishaq Khan* (with him Munshi *Gobind Prasad*), for the appellant

Mr *Abdul Raoof* (with him Mr *Ahmad Karim*), for the respondents

RICHARDS, C J and BANERJI, J —This appeal arises out of a suit for pre emption under the Muhammadan law The court of first instance dismissed the claim The lower appellate court decreed the claim reversing the court of first instance, and a learned Judge of this Court reversed the lower appellate court and restored the decree of the court of first instance

The question is whether the preliminaries required by the Muhammadan law have or have not been performed The evidence is that the plaintiff pre emptor immediately upon learning that the sale had taken place said " *mera haq shafa hai.* " This he repeated three times calling upon certain persons who were present to bear witnes On the moment without any delay he took the price of the house and brought it to the vendee and claimed the house, informing him of the fact that he had already made his demand So far as the question is a question of fact it rested with the lower appellate court to decide that question,

(1) (1909) 6 A. L. J. 15 (2) Weekly Notes, 1897 p 23.

(3) Weekly Notes 1897 p 93.

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and it was not competent for this court in second appeal to set aside the finding of the lower appellate court It is said, however, that the words which were used could under no possible circumstances constitute a good first demand under the Muhammadan law There is no doubt that certain expressions appear in the authorities as illustrations of what constitutes a good demand and the expression used in the present case is not amongst them It is laid down by Mr Ameer Ali, at page 606 of volume I of the last edition of his work on Muhammadan law that "no particular formula is necessary so long as the claim is unequivocally asserted" He cites abundant authority for this proposition There cannot be the least doubt that it was the intention of the plaintiff in the present case to assert and demand his right of pre emption It is possible if the words he used were the only evidence in the case that it might be said that the words were equivocal, and did not necessarily show that he was making a demand of pre emption, but the circumstances and what actually took place at the very moment that he used these words, do in our opinion demonstrate that it was his intention to make he demand, not merely to assert that his claim to pre empt existed, but actually to demand it He called the attention of witnesses to the fact and he at once went and got the money All these things happened simultaneously with the uttering of the words, not after the lapse of some time Our attention has not been called to any authority which lays down that we are not entitled to take into consideration what actually occurred at the moment to enable us to come to a *conclusion* whether or not the pre emptor was demanding pre emption when he used the particular expressions If the Court is entitled to consider these circumstances, then it was *quite* open to the lower appellate court to arrive at the conclusion at which it did arrive and the question becomes a question of fact binding in second appeal We think that it is impossible to lay down any hard and fast rule as to what expressions constitute a good first demand each case must be considered and decided upon its own peculiar facts and circumstances

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Reliance has been placed on the case of *Muhammad Abdul Rahman Khan* v *Muhammad Khan* (1) In that case the words used were —" I am pre emptor and my right extends to the land " It was held that these words were not sufficient to constitute a *talab i mawasibat* The learned Judges say at page 271, after referring to the Hidaya —" But we have nothing before us upon which it is possible to say that such a claim has been made or can be inferred " In our opinion this case is clearly distinguishable from the present case In the present case there are circumstances which occurred at the very moment at which the words were used from which it can reasonably be inferred that the demand was in fact being made We think that the decision of the lower appellate court ought to be restored

We accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower appellate court with costs of the two hearings in this Court

Appeal allowed

PRIVY COUNCIL

P C
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November 1

JIT SINGH AND OTHERS (DEFENDANTS) *v* MAHARAJ SINGH (PLAINTIFF)
[On appeal from the High Court at Allahabad]

Privy Council, practice of—Point of law as a ground of appeal which had not been dealt with by the courts below—Appeal heard ex parte

It is contrary to the practice of the Judicial Committee to allow a point to be raised on appeal before them which has not been discussed in the courts below and on which their Lordships have not got the assistance of those courts

APPEAL from a judgement and decree (20th February, 1907) of the High Court at Allahabad, which reversed a decree (18th March, 1904) of the court of the Subordinate Judge of Shahjahanpur

The facts of the case as alleged by Maharaj Singh the plaintiff (respondent) were that the three sons of one Nehchal Singh, namely Harihar Singh, Himmat Singh and Bahadur Singh, separated in the lifetime of Harihar Singh, after whose death his

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Present —Lord MACNAGHTEN Lord ROBSON Sir JOHN EDGE and Mr AMEER ALI

(1) (1903) 6 A. L. J., 270

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widow Ummed Kunwar obtained possession of his property and died on the 15th of March, 1892, when the two sons of her daughter, named Khangar Singh and Bishan Singh, succeeded to the property of Harihar Singh in equal shares, and that Khangar Singh, the father of the plaintiff, died on the 29th of July, 1892, and his estate devolved on the plaintiff, who demanded possession of it from the defendants, but they refused to give up possession The plaintiff further alleged that he was entitled to half the entire property left by the husband of Ummed Kunwar, and that for necessary expenses he had transferred half of his half share to one Musammat Bed Kunwar under a deed of sale, dated the 4th of September, 1903, and he therefore in the present suit, brought on the 11th of September, 1903, prayed for possession of the property of Harihar Singh to which he was entitled through Khangar Singh

Bahadur Singh had died without issue in 1878 Himmat Singh left a son, Nirmal Singh, who was the grandfather of Jit Singh, the first defendant The other defendants were members of the family, except one, who was a transferee from Jit Singh, and two others, who were mortgagees of a portion of the property in suit The only defence now material was that of Jit Singh, the first defendant, who pleaded (*inter alia*) that Khangar Singh the father of the plaintiff predeceased Ummed Kunwar, and that, therefore, the plaintiff had no right to the property in suit, that Himmat Singh, Bahadur Singh, Harihar Singh and Nirmal Singh were all members of a joint Hindu family and did not separate, and that the name of Ummed Kunwar had been entered in the papers only for her consolation and satisfaction on account of her being a widow, and in the third paragraph of the *written* statement he asserted that "even if, as stated by the plaintiff, Khangar Singh is the daughter's son of Harihar Singh, the plaintiff has, in the presence of Bishan Singh, no right to sue, because Khangar Singh died during the lifetime of Ummed Kunwar, otherwise the plaintiff would not have been silent for such a long time"

The suit of Maharaj Singh was numbered 119 of 1903 Two other suits relating to the property in dispute were brought in 1904, one by Bishan Singh (45 of 1904) on the allegation that on the death of Ummed Kunwar he alone succeeded to the property

of Harihar Singh, inasmuch as his brother Khangar Singh had predeceased Ummed Kunwar, and the other (52 of 1904) by Musammat Bed Kunwar, the transferee from Maharaj Singh, in which she claimed a one fourth of the estate of Harihar Singh The defendants in these two suits were the other members of the family

Maharaj Singh's suit (119 of 1903) was decided by the Subordinate Judge on the 18th of March, 1904 He held that the allegation on which the plaintiff's suit was based, namely that his father Khangar Singh survived his maternal grandmother Ummed Kunwar, was not proved either by the oral evidence, which he considered unreliable, or by the documents produced in support of it, and he decided the third issue (when did Khangar Singh die?) against the plaintiff, and holding that in view of that finding it was unnecessary to deal with the remaining issues, he dismissed the suit

Suits 45 and 52 of 1904 were admittedly tried together by consent, the evidence in one governing the other, and on the 30th of August, 1904, they were decided by the same Subordinate Judge who had decided Maharaj Singh's suit he, however, found the third issue in the plaintiff's favour in each case, and decreed those suits

Five appeals were preferred to the High Court in the three suits Maharaj Singh's appeal was 170 of 1904, the appeals of the defendants in Bishan Singh's suit (45 of 1904) were 264 and 279, and the defendant's appeals in Bed Kunwar's suit (52 of 1904) were 263 and 289 All the appeals were heard together by P C BANERJI and R S AIKMAN, J J, who delivered their main judgement in appeal 264, in which, after stating that the five appeals were "connected appeals," and deciding two other issues of fact, namely (1) were Bishan Singh and Khangar Singh the sons of Harihar Singh's daughter? and (2) was Harihar Singh separate from his brothers?, in concurrence with the decision by the Subordinate Judge of those issues in suit 45 of 1904, pointed out that on the issue whether Khangar Singh did or did not predecease Ummed Kunwar the Subordinate Judge "came to the conclusion in the suit of Bed Kunwar (52 of 1904) that Khangar Singh survived his grandmother, a conclusion

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opposed to his finding in Maharaj Singh's suit", and on that issue remarked as follows —

"Here too the oral evidence is conflicting and as mentioned above the learned Subordinate Judge has come to two opposite conclusions on this issue It is admitted that Ummed Kunwar died on the 15th of March, 1892 On behalf of Maharaj Singh and Bed Kunwar reliance is placed on the report of a patwari dated the 22nd of September 1892 in which the date of Khangar s death is given as the 29th of July 1892 In his later judgement the learned Subordinate Judge refers to this as one of the pieces of evidence which had led him to change his mind But in our opinion this report of the patwari as to the date of Khangar s death is unreliable There is evidence printed at pages 18 and 19A of First Appeal No 263 which in our opinion shows that Khangar Singh was dead on the 4th of July 1892 On that date Bishan Singh applied for the entry of the names of himself and Maharaj Singh the son of Khangar Singh in the place of Musammat Ummed Kunwar In this petition Bishan Singh associated with himself Maharaj Singh the minor son of Khangar Singh under the guardianship of Fateh Singh the maternal uncle of Maharaj Singh This clearly indicates to us that Khangar Singh was dead on that date Although however Khangar Singh may have been dead before the 4th of July 1892 when the petition was presented it does not at all follow that he was dead on the 15th of March when Ummed Kunwar died The very fact that Bishan Singh associated Khangar s son with himself in this application is a strong indication that Khangar Singh did survive Ummed Kunwar It is quite clear from the documentary evidence that there was no love lost between Bishan Singh and Khangar Singh In the preceding January Bishan Singh had got Khangar Singh ejected from certain land of which he was declared to be Bishan Singh s sub-tenant If Khangar Singh had predeceased Ummed Kunwar we think Bishan Singh would never have associated Maharaj Singh with him elf in this petition. He would have claimed the whole of the inheritance for himself There is also filed a copy of a judgement of a Deputy Collector dated the 31st of March 1892 passed on an application made by Khangar Singh against Bishan Singh We think it is probable that had Khangar Singh been dead on that date the matter would have been brought to the attention of the court Under these circumstances we are unable to say that the later conclusion arrived at by the learned Subordinate Judge as to the time of Khangar s death is wrong

"Upon the findings at which we have arrived in concurrence with the court below that court was justified in decreeing one half of the claim of Bishan Singh and the suit of Bed Kunwar and the appeals filed against the decrees in those suits must fail. That court should have decreed the claim of Maharaj Singh and his appeal must prevail

The result of this decision was that the following order was made by the High Court in the appeal (170 of 1904) of the respondent in the present appeal —

"This is the appeal of Maharaj Singh in the suit brought by him which was dismissed by the court below For the reasons stated by us in our judgement in appeal "61 of 1901 decided to-day this appeal must prevail We

accordingly decree the appeal set aside the decree of the court below and make a decree in favour of Maharaj Singh on the same terms as the decree made by the court below in the suit of Bed Kunwar No 52 of 1904

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In the petition by the defendants to the High Court for leave to appeal to His Majesty in Council one of the grounds taken was, that in any event during the lifetime of Bishan Singh the plaintiff Maharaj Singh was not entitled to maintain the suit This ground had not been dealt with by either of the courts in India

On this appeal, which was heard *ex parte*—

Ross for the appellants contended that the High Court had erred in holding that the respondent had proved that Khangar Singh survived Ummed Kunwar In the respondent's suit the Subordinate Judge had held that the evidence was unreliable, and that the respondent had not established his allegation to that effect, and though in the other suits by Bishan Singh and Bed Kunwar the Subordinate Judge had come to an opposite conclusion, it was admitted that those two suits which had not been brought until 1904, had been tried together by consent of the parties on the same evidence and decided in the first court on the 30th of August, 1904, the respondent's suit had been instituted on the 11th of September, 1903, and decided on the 18th of March, 1904, and was therefore it was submitted, clearly tried quite independently of the two later suits In the High Court, no doubt, the appeals in the three suits were all heard together and treated as "connected appeals" But it was only by referring to evidence not on the record in the respondent's suit, and which was never made part of the record in that suit on any application of the parties or by any order of the court, that there was any concurrence in the decisions of the courts in India to the effect that Khangar Singh had survived his grandmother Such evidence, it was contended, had been wrongly referred to by the High Court The proper course when the High Court reversed the decision of the first court on a preliminary issue, as it did in the respondent's suit, would have been to remand the case to the Subordinate Judge for trial of the remaining issues Besides the High Court had held that the fresh evidence in the later suits on which the Subordinate Judge professed to have changed his opinion, was

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not reliable [Their Lordships thought that there were concurrent decisions on the point as well as on the other matters of fact in the case] It was then submitted that the respondent was not entitled in law to maintain his suit at all as long as Bishan Singh was alive (1) [MR AMEER ALI Can you raise a new point like that now, especially in a case heard *ex parte*?] Notice of appeal has been duly given and the respondent might have appeared, the point of law suggested was taken in the third paragraph of the appellant Jit Singh's written statement, though it was not dealt with by the courts below [SIR JOHN EDGE The paragraph of the written statement referred to cannot, I think, be interpreted as raising the point you now suggest] It appears to raise the same point, which is one that was again raised in the grounds for leave to appeal to His Majesty in Council [Their Lordships, however, were of opinion that the point now raised had not (except as a ground for leave to appeal to England) been taken before the courts in India, and that it could not be taken for the first time before the Judicial Committee]

The judgement of their Lordships was delivered by LORD MACNAGHTEN —

It is not usual to allow a point to be raised here on appeal which has not been discussed in the Court below, and upon which their Lordships have not got the assistance of the Court below

On this ground their Lordships will humbly advise His Majesty that this appeal should be dismissed

Appeal dismissed

Solicitors for the appellants —*Barrow, Rogers and Nevill*

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(1) This contention which Mr Ross was not allowed to raise was on the lines of Mr Mayne's argument in *Venkayamma Garu v Venkata Ramanayyamma Bahadur Garu* (1901) I L R 25 Mad 678 at page 682 to the effect that takers of obstructed heritage are joint tenants if in the same generation then survivorship follows a contention which was accepted by the Judicial Committee in that case On that authority and applying it to the present case if it be assumed in the respondent's favour that Khangar Singh survived Ummed Kunwar he took the estate as a joint tenant with his brother Bishan Singh and on Khangar Singh's death Bishan Singh by right of survivorship succeeded to the whole estate and Maharaj Singh not being in the same generation was excluded by law and had no right of suit until Bishan Singh's death. *Reporter's note*

JAMNA DAS (DECREE HOLDER) v RAM AUTAR PANDE AND OTHERS (JUDGEMENT DEBTORS)

P C 1911 November 2

[On appeal from the High Court at Allahabad]

No IV of 1882 (Transfer of Property Act) section 90—Mortgage—Sub mortgage—Purchaser from mortgagor—Mortgage money part of consideration for sale—Personal liability of purchaser—Sale of mortgagees rights

In this case it was held (affirming the decisions of the Courts in India *Jamna Das* v *Ram Autar Pande* (1) that the purchaser of the mortgaged perty was not a person from whom the balance of the mortgage debt was gally recoverable within the meaning of section 90 of the Transfer of perty Act IV of 1882

APPEAL from a decree (20th April 1909) of the High urt at Allahabad, which affirmed a decree (16th April, 1907) the court of the Subordinate Judge of Mirzapur

The appellant, the holder of a mortgage decree against respondents under section 88 of the Transfer of Property t (IV of 1882), applied for a decree under section 90 of that t, which enacts that "when the net proceeds of any such e are insufficient to pay the amount due for the time being the mortgage, if the balance is legally recoverable from the fendant otherwise than out of the property sold, the court ay pass a decree for such sum"

The first respondent Ram Autar Pande was the purchaser the mortgaged property, and the other respondents were the presentatives of the mortgagor

The Subordinate Judge allowed the application against the dgement debtors other than Ram Autar Pande, but dismissed as against him

The main question for decision in this appeal was hether the courts below were wrong in holding that a decree nder section 90 could not be passed against the first responent

The facts are stated in the report of the case before the igh Court (RICHARDS and GRIFFIN, J J) which will be und in I L R, 31 All, 352

Present:—Lord MACNAGHTEN Lord ROBSON SIR JOHN EDGE and MR. MEER ALI.

(1) (1909) I. L. R., 31 All., 352.

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JAMNA DAS v RAM AUTAR PANDE

On this appeal—

Sir H Erl Richards, K C and *Ross* for the appellant contended that the first respondent was not merely the purchaser of the equity of redemption, but of the whole mortgage debt, and part of the purchase money had been left in his hands in order to pay off the debt, and that a personal decree could therefore be made against him for payment The word "defendant" in section 90 of the Transfer of Property Act was not limited to the mortgagor In making the decree under section 88, which was dated the 29th of November, 1904 (1), the High Court said that if the sale did not satisfy the decree the "mortgagee rights" (which had not been sold) could be proceeded against in execution of the decree Reference was made to *Matidin Kasodhan* v *Kazim Husain* (2) and *Ganga Prasad* v *Chunni Lal* (3) [Lord MACNAGHTEN referred to *Izzatunnissa Begam* v *Partab Singh* (4)] The decisions of the courts in India, it was submitted, were therefore wrong and should be set aside

DeGruyther, K C and *B Dube* for the first respondent were not called upon

The judgement of their Lordships was delivered by LORD MACNAGHTEN —

This is a perfectly plain case The action is brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor The mortgagee has no right to avail himself of that He was no party to the sale The purchaser entered into no contract with him, and the purchaser is not personally bound to pay this mortgage debt Therefore, he is not a person from whom, in the words of the 90th section of the Transfer of Property Act, "the balance is legally recoverable"

Their Lordships will therefore humbly advise His Majesty that this appeal must be dismissed with costs

Appeal dismissed.

Solicitors for the appellant —*Ranken Ford, Ford and Chester*

(1) See I L R, 27 All, 264
(2) (1891) I L R, 13 All, 432
(3) (1896) I L R, 18 All, 118
(4) (1909) I L R, 31 All, 583

Solicitors for the respondent Ram Autar Pande —*Barrow, Rogers and Nevill* — 1911

J V W

JAMNA DAS v RAM AUTAR PANDE

P C 1911 *November* 3 22

LEKHRAJ KUNWAR (PLAINTIFF) v HARPAL SINGH AND OTHERS (DEFENDANTS)

[On appeal from the High Court at Allahabad]

Hindu law—Inheritance—Impartible estate governed by rule of primogeniture—Estate devised to widow of owner—Suit by reversioner—Compromise of suit by widow and reversioner—Descent of estate governed by the compromise and not by will

The owner of an impartible estate governed by the rule of primogeniture died leaving a will by which he gave an absolute estate to his widow against whom S the next reversioner brought a suit on the ground that the will was invalid and that he was entitled to possession of the estate In that suit the parties came to a compromise by the terms of which it was agreed that the widow should hold for her life the position of 'gaddi nashin paying S a monthly allowance and that after her death S or any representative of his who may be living at that time will be the absolute owner of all the movable and immovable properties and will occupy the gaddi' S predeceased the widow leaving no male issue and without having made any disposition by will or otherwise of his interest in the estate On the death of the widow in possession the widow of S sued to recover the estate from members of her husband's family who had possession of it

Held by the judicial Committee (affirming the decision of the High Court) that the rights of the parties depended not on the will but on the compromise, the terms of which gave S a vested interest in the estate, which retained its character of impartibility and on the death of S descended not to his widow (the appellant) but to the respondent his heir according to the rule of primogeniture

APPEAL from a judgement and decree (29th May 1908) of the High Court at Allahabad, which reversed a judgement and decree (24th February 1906) of the District Judge of Jaunpur and dismissed the appellant's suit

The main question for determination in this appeal was as to the effect of a document, dated the 25th of April, 1896, called a compromise, as to the interpretation and legal effect of which the courts in India differed, the District Judge construing it in favour of the appellant and the High Court in favour of the respondents

The facts of the case are fully stated in the judgement of the High Court, and in the judgement of their Lordships of the

Present :—Lord MACNAGHTEN Lord ROBSON SIR JOHN EDGE and MR AMEER ALI.

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LEKHRAJ KUNWAR v HARPAL SINGH

Judicial Committee The report of the case before the High Court (SIR JOHN STANLEY, C J and BANERJI, J) will be found in I L R, 30 All, 406

On this appeal—

Sir Erle Richards, K C, and *B Dube* for the appellant contended that the will of Randhir Singh in favour of his wife Sonao Kunwar conferred on her an absolute proprietary estate, and that the effect of such transfer was to destroy the original character of impartibility of the estate and the special custom of primogeniture regulating its descent Reference was made to *Suraj Mani* v *Rabi Nath Ojha* (1) *Bhoobun Mohini Debi* v *Hurrish Chander Chowdhry* (2) and *Abdul Wahid Khan* v *Nuran Bibi* (3) The estate therefore came to Sonao Kunwar as an absolute estate governed by the ordinary rules of Hindu law Under the compromise, dated the 25th of April, 1896, made between Sheopal Singh and Sonao Kunwar, the former took, subject to the life interest of the latter an absolute vested estate in the property which became self-acquired, and was governed by the Mitakshara law The High Court had therefore erred in holding that by the terms of the compromise it was the intention of the parties that the estate should on the death of Sonao Kunwar descend by the rule of the primogeniture [*DeGruyther K C* referred to *Khunni Lal* v *Gobind Krishna Narain* (4) as supporting the decision of the High Court in the present case]

DeGruyther, K C, and *Ross* for the respondents were not called upon

The judgement of their Lordships was delivered by SIR JOHN EDGE —

This is an appeal by Thakurain Lekhraj Kunwar (the plaintiff) from the decree of the High Court of Judicature for the North Western Provinces of India, dated the 29th of May, 1908, which set aside the decree in the plaintiff's favour of the District Judge of Jaunpur, and dismissed the plaintiff's suit and certain objections which had been filed by her

(1) (1907) I. L. R. 30 All., 84; L. R., 35 I. A. 17

(2) (1878) I. L. R., 4 Calc., 23, L. R., 5 I. A., 138

(3) (1885) I. L. R., 11 Calc., 597 L. R., 12 I. A., 91

(4) (1911) I. L. R., 33 All., 3 6

In the suit in which the decree now under appeal was made the plaintiff, who was the widow of Sheopal Singh, claimed proprietary possession of the riasat of Singra Mau in the district of Jaunpur, and mesne profits The defendants to the suit, who are respondents to this appeal, are Thakur Harpal Singh, a distant cousin in the male line of Sheopal Singh, Shamsher Bahadur Singh, a younger brother of the father of Thakur Harpal Singh, Raghuraj Bahadur Singh and Rampal Singh, minors, sons of Shamsher Bahadur Singh, and Thakurain Janki Kunwar, the widow of Rudarpal Singh, who was a brother of Sheopal Singh and had died without male issue The last common ancestor of Sheopal Singh and Thakur Harpal Singh was Dammar Singh

The District Judge of Jaunpur gave the plaintiff Thakurain Lekhraj Kunwar a decree for possession as a Hindu widow, and decreed mesne profits From that decree the defendants, Thakur Harpal Singh and Shamsher Bahadur Singh, on his own behalf and as guardian of his sons Raghuraj Bahadur Singh and Rampal Singh, appealed to the High Court, and in that appeal the plaintiff filed objections to the decree of the District Judge, claiming that she was entitled to a decree for possession of the Singra Mau estate as an absolute owner, and not merely for the estate of a Hindu widow The defendant, Thakurain Janki Kunwar, did not defend the suit, she claimed no interests

The question upon which this appeal depends is a short one The estate of Singra Mau descended in the male line from Dammar Singh as an impartible estate to one Randhir Singh, who died without male issue in January 1895 In the family to which Randhir Singh, Sheopal Singh and Thakur Harpal Singh belonged the rule of primogeniture applied so far as this estate of Singra Mau was concerned. The pedigree of the family will be found in the judgement of the High Court, it is sufficient now to say that Sheopal Singh, who was the plaintiff's husband, was the son of Jagarnath Singh, a younger brother of Randhir Singh, and that on the death of Sheopal Singh without a son in July, 1899, the defendant Thakur Harpal Singh was, subject to the life interest of Thakurain Sonao Kunwar under a compromise, the next member of the family who was entitled to the possession of Singra Mau, if the estate was then impartible The question as to whether the

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estate had ceased to be impartible or had continued to be and was impartible on the death of Sheopal Singh depends upon the construction of an agreement of compromise of the 25th of April, 1896, to which Sheopal Singh and Thakurain Sonao Kunwar, who was the junior widow of Randhir Singh, were the parties

Randhir Singh, who was then 74 years of age, and in possession of the impartible estate of Singra Mau, made a will on the 15th of December, 1894, by which he left his entire estate and every kind of movable and immovable property of which he was then in possession to Thakurain Sonao Kunwar, his junior wife It is admitted that if Randhir Singh was then of testamentary capacity he had power as the owner in possession of the impartible estate of Singra Mau to make that will, and by it to put an end to the impartibility of the estate, and to exclude his nephew Sheopal Singh from the succession, which was the effect of the will as it was executed After the death of Randhir Singh his widow Thakurain Sonao Kunwar applied for a grant to her of probate of the will Sheopal Singh and others filed objections to probate being granted, thereupon in March, 1896, Sheopal Singh brought a suit in the Court of the Subordinate Judge of Jaunpur against Thakurain Sonao Kunwar and Thakurain Shankar Kunwar, the senior widow of Randhir Singh, a *pro formâ* defendant, and Babu Soridat, also a *pro formâ* defendant, in which Sheopal Singh alleged that when Randhir Singh was seriously ill and on the point of death, and quite incapable of entering into any contract or of understanding any transaction, the well wishers of Sonao Kunwar and Shankar Kunwar, having colluded together, caused the will to be executed Sheopal Singh further alleged in that suit that according to the old custom and nature of the property, and also on the strength of right of survivorship, the right to occupy the *gaddi* and to enter into possession of the entire estate devolved upon him on the death of Randhir Singh, and he prayed for a declaration that the will of the 15th of December, 1891, was null and void as against him and the estate, and for a decree dispossessing Thakurain Sonao Kunwar and Thakurain Shankar Kunwar and awarding absolute possession to him, Sheopal Singh, over the entire estate of Singra Mau, together with

imlaks, movable and immovable property appertaining to the said estate

On the 25th of April, 1896, Sheopal Singh and Thakurain Sonao Kunwar entered into an agreement of compromise which was executed by them and was in the form of a petition to the court of the Subordinate Judge of Jaunpur in the suit which had been brought by Sheopal Singh against Sonao Kunwar, Shankar Kunwar and Babu Soridat That petition was presented to the court of the Subordinate Judge, and on the 27th of April, 1896, the Subordinate Judge made a decree in the suit in accordance with the petition giving possession of the estate to Sonao Kunwar for her life subject to the terms of the compromise

The petition of compromise was as follows —

"1 The name of Musammat Thakurain Sonao Kunwar will continue to be recorded in the revenue papers in the same way in which it stands recorded and she will remain in possession during her lifetime of all the movable and immovable properties of which Rai Randhir Singh was in possession exercising the powers of *gaddinashin* (occupier of *gaddi*) without the power to transfer or charge the estate in any way

2 I Thakur Sheopal Singh will take the sum of Rs 12 000 a year at the rate of Rs 1 000 per month from Musammat Thakurain Sonao Kunwar for all my expenses and I Musammat Thakurain Sonao Kunwar will pay the same I Thakur Sheopal Singh will not interfere with the estate in any way in the lifetime of Musammat Sonao Kunwar After the death of Musammat Thakurain Sonao Kunwar I Thakur Sheopal Singh or any representative of mine who may be living at that time will be the absolute owner of all the movable and immovable properties possessed by Rai Randhir Singh and will occupy the *gaddi* In case of non payment of the fixed annual allowance I Thakur Sheopal Singh will have power to recover the same by instituting a suit and attaching the profits and movable property belonging to Thakurain Sonao Kunwar

3 If I, Thakur Sheopal Singh have to go to any member of the brotherhood or any *rais* on the occasion of any ceremony or otherwise I will have authority to take as much equipage belonging to the estate as I require and when I go out for recreations, &c I will take any conveyance I like for my use Thakurain Sonao Kunwar will have no power to forbid me

"4 If on any particular occasion any indispensable necessity arise in the estate and it be necessary to take a loan we Thakur Sheopal Singh and Musammat Thakurain Sonao Kunwar will in concurrence with each other borrow five or ten thousand rupees and repay the same gradually from the profits of the estate

5 I, Thakurain Sonao Kunwar also accept all the aforesaid conditions, It is therefore prayed that the case may be struck off as a contested one on the basis of this compromise, and the costs incurred by the parties be charged against themselves This compromise may be embodied in the decree.

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estate had ceased to be impartible or had continued to be a[n] was impartible on the death of Sheopal Singh depends up[on] the construction of an agreement of compromise of the 25[th] of April, 1896, to which Sheopal Singh and Thakurain Son[ao] Kunwar, who was the junior widow of Randhir Singh, were t[he] parties

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"1 The name of Musammat Thakurain Sonao Kunwar will continue to be recorded in the revenue papers in the same way in which it stands recorded and she will remain in possession during her lifetime of all the movable and immovable properties of which Rai Randhir Singh was in possession exercising the powers of *gaddinashin* (occupier of *gaddi*) without the power to transfer or charge the estate in any way

2 I, Thakur Sheopal Singh will take the sum of Rs 12 000 a year at the rate of Rs 1 000 per month from Musammat Thakurain Sonao Kunwar for all my expenses and I Musammat Thakurain Sonao Kunwar will pay the same I, Thakur Sheopal Singh will not interfere with the estate in any way in the lifetime of Musammat Sonao Kunwar After the death of Musammat Thakurain Sonao Kunwar I Thakur Sheopal Singh or any representative of mine who may be living at that time will be the absolute owner of all the movable and immovable properties possessed by Rai Randhir Singh and will occupy the *gaddi* In case of non payment of the fixed annual allowance I Thakur Sheopal Singh will have power to recover the same by instituting a suit and attaching the profits and movable property belonging to Thakurain Sonao Kunwar

3 If I Thakur Sheopal Singh have to go to any member of the brotherhood or any *rais* on the occasion of any ceremony or otherwise I will have authority to take as much equipage belonging to *the* estate as I require and when I go out for recreations &c I will take any conveyance I like for my use Thakurain Sonao Kunwar will have no power to forbid me

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LEKHRAJ KUNWAR v. HARPAL SINGH

Musammat Thakurain Shankar Kunwar and Sonidat *pro formâ* defendants have been exempted

Sheopal Singh died on the 27th of July 1899 without issue male, and without having made any disposition by will or otherwise of his interest in the Singra Mau estate Thakurain Sonao Kunwar, who had been in possession of the estate under the compromise of the 25th of April, 1896, died on the 20th of June, 1904, and thereupon Thakurain Lekhraj Kunwar and Thakur Harpal Singh respectively claimed possession of the estate On the 6th of July, 1904, the Collector of Jaunpur ordered mutation of names in favour of Thakur Harpal Singh, from that order Thakurain Lekhraj Kunwar appealed to the Commissioner of Benares, who on the 2nd of September, 1904, dismissed the appeal

The District Judge of Jaunpur in his judgement in this suit held that the estate had descended to Thakurain Sonao Kunwar under the will of Randhir Singh by an entirely new title, and had thereby *lost its character of impartibility*, and was no longer subject to the special custom of descent The District Judge further held that the estate which Sheopal Singh would have taken had he survived Thakurain Sonao Kunwar, would be self acquired by Sheopal Singh as arising out of the contract of compromise with Thakurain Sonao Kunwar As the learned Judges in the High Court rightly observed, the District Judge went behind the compromise and held that the will was a valid will binding on Sheopal Singh, and determined what in his opinion were the rights of the parties before the compromise, the very thing the avoidance of which led to the compromise The learned Judges in the appeal in the High Court held that the rights of the parties to this suit depended upon the construction of the compromise, but not upon the will of Randhir Singh With that conclusion their Lordships in this appeal agree They also held that—

"upon the language of the compromise it is not possible to hold that the character of the estate as it had been handed down from father to son for generations was changed As an impartible estate Sheopal Singh laid claim to it, and the compromise provided that as an impartible estate it should devolve upon him."

And they accordingly dismissed the suit

Their Lordships consider that the High Court put the only possible construction upon the agreement of compromise Sheo

pal Singh never admitted the validity of the will as against him, and never admitted that Thakurain Sonao Kunwar had obtained any title under the will It is obvious from the terms of the compromise that Sheopal Singh consistently maintained that the will was invalid and consequently that Thakurain Sonao Kunwar had taken no title under it, and that the estate as an impartible estate had vested in him on the death of Randhir Singh By the compromise Sheopal Singh, reserving to himself an income of Rs 12,000 a year out of the estate, gave to Thakurain Sonao Kunwar a *bare interest for her life in his impartible estate* Sheopal Singh in the agreement of compromise carefully provided that on the death of Thakurain Sonao Kunwar, he or his successor should be the absolute owner of the estate and should occupy the *gaddi*, that on the occasion of any ceremony, or when he should go out for recreation, he should have the right to take as much equipage and any conveyance belonging to the estate for his use as he should require, and that Thakurain Sonao Kunwar should have no power to forbid him, and that should it be indispensably necessary to raise any money on the estate by way of loan, he and Thakurain Sonao Kunwar should in concurrence with each other borrow Rs 5,000 or Rs 10,000 and repay the same gradually from the profits of the estate Under the compromise Thakurain Sonao Kunwar had no power to encumber the estate for any purpose, except in conjunction with Sheopal Singh The terms to which their Lordships have referred are consistent only with the construction placed upon the compromise by the High Court, and there are no terms in the compromise which suggest any other construction To these terms Thakurain Sonao Kunwar submitted It may be mentioned that the Subordinate Judge of Jaunpur before making his decree of the 27th of April, 1896, took the precaution of ascertaining that Thakurain Sonao Kunwar understood the terms of the compromise The High Court rightly dismissed the suit of Thakurain Lekhraj Kunwar

The fact that after the compromise the will of Randhir Singh was admitted to probate did not affect the rights of Sheopal Singh

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LEKHRAJ KUNWAR v. HARPAL SINGH

Their Lordships will humbly advise His Majesty that the judgement and decree appealed against should be affirmed and the appeal dismissed with costs

Appeal dismissed

Solicitors for the appellant —*T C Summerhays and Son*

Solicitors for the respondents —*Barrow, Rogers and Nevill*

J V W

APPELLATE CIVIL

1911
July 19

Before Mr Justice Sir George Knox and Mr Justice Piggott

GANGA SINGH AND ANOTHER (DEFENDANTS) v BANWARI LAL AND OTHERS (PLAINTIFFS)*

Act No IV of 1882 (Transfer of Property Act) sections 88 89—Joint decree for sale—Application for order absolute made by some of the decree holders after the coming into force of the Civil Procedure Code 1908, Civil Procedure Code (1908) order XXXIV—Act No X of 1897 (General Clauses Act) section 6

A decree for sale under the provisions of section 88 of the Transfer of Property Act 1882 was passed jointly in favour of *B* and *K* *B* died before any order absolute for sale was passed On the 30th of April 1909 the sons of *B* made an application for an order absolute for sale under section 89 of the Transfer of Property Act. *K* was not made a party to it.

Held that the application would lie inasmuch as the sons of *B* being joint decree-holders with *K* were entitled to apply for an order for sale (whether or not such order be in fact a final decree) their right to do so being inherent in the decree under section 88 of the Transfer of Property Act The subsequent repeal of the section could not affect any right acquired or liability incurred thereunder

THE facts of this case were briefly as follows —On the 30th of April, 1906 Bhagwan Das and Musammat Kaunsilla jointly obtained, under section 88 of the Transfer of Property Act, a decree for sale upon a mortgage After the decree Bhagwan Das died His heirs applied in the execution department on the 30th of April 1909, for a decree absolute under section 89 of the Transfer of Property Act It was stated in the application that as Musammat Kaunsilla did not join in it the decree absolute might be prepared in such manner as to safeguard her interests in accordance with order XXI, rule 15 The judgement-

* Second Appeal No 69 of 1910 from a decree of Austin Kendall District Judge of Cawnpore dated the 27th of September 1909 confirming a decree of Mohan Lal Hakku Subordinate Judge of Cawnpore, dated the 31st of July,

debtors objected, *inter alia*, that the heirs of Bhagwan Das alone could not apply for a decree absolute Musammat Kaunsilla did not appear to contest the application Both the lower courts granted the application The judgement debtors filed a second appeal

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GANGA SINGH v BANWARI LAL.

Babu *Piari Lal Banerji* (for Dr *Satish Chandra Banerji*), for the appellants —

The application for a decree absolute was made after the new Civil Procedure Code had come into operation The question is, whether the application would be governed by the new or by the old law Under the old law an application for an "order" absolute under section 89 of the Transfer of Property Act, would be an application in execution, and, therefore, it could be made by some only of the decree holders under the provisions of section 231 of the old Code But the new Code, order XXXIV, rule 5, speaks of a "decree" absolute and not an "order" absolute That is the final decree in a mortgage suit now, and the suit terminates not on the passing of a decree *nisi* but of the decree absolute Therefore, under the new Code an application for a decree absolute is an application in the suit itself and not in execution of a decree, and such an application cannot be made by some of the plaintiffs but must be made by all of them, for order XXI, rule 15, applies only to applications in execution The right to obtain a decree absolute is not denied, but the question is, in what way will the plaintiffs proceed to obtain it? The question is one of procedure alone and not of a substantive right Accordingly, the application will be governed by the law of procedure in force at the time when it is made, namely, the new Code The ruling in the analogous case of *Kounsilla* v *Ishri Singh* (1) only decided that where substantive rights had been acquired under the old Code, they could not be taken away by the new Code In the present case the question is purely one of procedure, in which no one has a vested right, *Fateh Chand* v *Muhammad Bakhsh*, (2) in which, too the decree *nisi* was before the new Code, and the application for decree absolute was made after the Code came into operation The principle of the

(1) (1910) 7 A. L. J., 420 (2) (1894) I. L. R., 16 All., 259 (264

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Ganga Singh v. Banwari Lal.

in *Basiruddin Mandal* v. *Sonaulla Mandal* (1) is also in my favour. The case of *Gajraj Lal* v. *Ramdin Lal* (2) is distinguishable.

Munshi *Gulzari Lal*, for the respondents:—

The applicants applied that the order absolute be framed and that the name of the Musammat might also be entered therein. It was not an application for a decree absolute in their own favour alone. It is open to some of the decree holders to apply for the framing of a decree absolute in the name of all. The judgement debtors suffer no loss whatever, as the decree absolute has been rightly framed in the usual form. It may be said that the substantive right of some of the decree holders to obtain an order absolute without joining the others cannot be affected by the change, if any, in the new law. The new law, however, makes no material change.

Babu *Piari Lal Banerji*, replied.

KNOX and PIGGOTT, JJ.—In this case a conditional decree for sale under the provisions of section 88 of the Transfer of Property Act (Act IV of 1882) was passed in favour of one Bhagwan Das and his sister-in law Musammat Kaunsilla jointly; the time fixed for payment under the said decree expired on the 30th of October, 1906. Bhagwan Das died before any order absolute for sale was passed. On the 30th of April, 1909, Banwari Lal and another, sons of Bhagwan Das, presented the application out of which the present appeal has arisen. They ask for "a decree absolute under section 89 of Act No. IV of 1882," after issue of notice both to the judgement-debtors and to the joint decree holder, Musammat Kaunsilla. With reference to the latter they state that she had declined to join in the application, and they accordingly pray the Court to pass such orders as it may deem necessary for protecting her interests, in accordance with the provisions of order XXI, rule 15, of the Code of Civil Procedure. Now the said Code (Act V of 1908) had come into force on the first day of January, 1909, and by section 156 of the said Code, sections 85 to 90 inclusive, of the Transfer of Property Act (Act IV of 1882) are repealed. It was therefore impossible for the Court to give Bhagwan Das and his brother

(1) (1910) 15 C. W. N., 102. (2) (1910) 7 A. L. J., 1070.

"a decree absolute under section 89 of the Transfer of Property Act," so that the application of the 30th of April, 1909, was certainly irregular in form This point, however, was never taken by the judgement debtors They put in a petition of objection contesting the application on various grounds, but they never took the point that the matter was not one in respect of which an application in execution could be made, and the case is now before us as an "Execution Second Appeal" The joint decree-holder, Musammat Kaunsilla, has put in no appearance, the case has been contested by the judgement-debtors only, and it is they who are now appellants before this Court Of the various points raised by them in their petition of objection most have been concluded against them by the findings of the lower appellate court, and are not now before us The memorandum of appeal to this Court contains three paragraphs, but the second and third are merely arguments in support of the plea taken in the first This runs as follows —

"Because the court below has erred in holding that one out of two plaintiffs in a mortgage suit is entitled to obtain a decree absolute for sale"

As put before us in argument this plea involves three propositions of law —

(i) That the holder of a decree for sale passed under the provisions of section 88 of the Transfer of Property Act (Act IV of 1882), who had not yet obtained an order absolute for sale under section 89 of the said Act at the time when both sections were repealed by the passing of the new Code of Civil Procedure (Act V of 1908), cannot execute his decree without first obtaining a "final decree" in the suit itself under the provisions of order XXXIV, rule 5, of the said Code

(ii) That an application for such final decree is not a proceeding in execution, so that the provisions of order XXI, rule 15, of the Civil Procedure Code, have no bearing on such application

(iii) That by reason of the use of the words "on application made in that behalf by the plaintiff" in order XXXIV, rule 5, aforesaid, the application referred to must necessarily fail unless presented by all the persons who appeared as plaintiffs in the suit

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GANGA SINGH v BANWARI LAL

The first of these propositions is open to argument, but we are not satisfied that it is necessary for us either to affirm or to deny it in order to dispose of the present appeal The new Code of Civil Procedure simply repeals sections 85 to 90 of the Transfer of Property Act, and does not contain any provision to the effect that any decree passed under section 88 shall have the effect of (or shall be deemed to be) a "preliminary decree" under order XXXIV, rule 4 The opening words of order XXXIV, rule, 5, refer to "the amount declared due *as afore said*,' *i e*, in a preliminary decree passed under the preceding rule It seems probable that the Legislature did not contemplate the particular case of the holder of a decree under section 88 of the Transfer of Property Act who had not yet obtained an order absolute for sale under section 89 of the same Act when the new Civil Procedure Code came into force That the decree is not abrogated by the repealing clause in the new Code is obvious enough, the case is covered by the provisions of section 6 of the General Clauses Act (Act X of 1897) The repeal of section 89 of the Transfer of Property Act does not in itself dispose of the question, a decree under section 88 of the same Act directs that "in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold," and the question is whether a court has or has not power to pass an order directing sale to take place in execution of the said decree, even though section 89 has disappeared from the Statute book

An order for sale of some sort or kind there must be The question whether such an order is nothing more than an order in execution or whether it must necessarily take the form and have the effect of a ' final decree" under order XXXIV, rule 5, of the Code of Civil Procedure, does not really arise in the present case The order for sale actually passed is one in favour of all the decree holders (including Musammat Kaunsilla) and is in the form prescribed for orders under section 89 of the Transfer of Property Act, it is not open to objection on the ground of any defect or informality even if it be held that a "final decree" under order XXXIV, rule 5, of the present Civil Procedure Code, was what was really required On the pleadings

in this case it is not really open to the judgement-debtors to contend that the order for sale, whatever might be its form or its legal effect when considered from other points of view, could be passed otherwise than in execution of the original decree under section 88 of the Transfer of Property Act, and upon an application to execute that decree. Their own petition of objection presented to the first court on the 22nd of May, 1909, only raises the point with which we are now dealing in the form of a plea that "the sons of Bhagwan Das alone are not competent *to take out execution of the whole of the decree*."

Moreover, we are of opinion that in any case the sonsof Bhagwan Das, as joint decree holders, were entitled under the circumstances of this case to apply for an order for sale (whether or not such order be in fact a "final decree" under order XXXIV, rule 5, of Act No. V of 1908) in favour of themselves and of Musammat Kaunsilla. Their right to do so was inherent in the decree obtained by them under section 88 of the Transfer of property Act. The subsequent repeal of that section could not "affect any right acquired or liability incurred" thereunder, vide section 6 of the General Clauses Act (Act X of 1897). Under that decree as passed, any one of the joint decree-holders could apply to the Court for an order absolute for sale subject to such orders as the court might see fit to pass to safeguard the rights of the other decree holders. We see no reason for holding that this right has been taken away by subsequent legislation. It is not a question of procedure, but of a right inherent in the decree.

For these reasons we hold that this appeal fails, and we dismiss it accordingly with costs.

Appeal dismissed.

1911
August 3

REVISIONAL CRIMINAL

Before Mr Justice Sir George Knox and Mr Justice Piggott

EMPEROR *v* MASIT*

Act No XLV of 1860 (Indian Penal Code) section 296—Disturbing a religious assembly—Religious procession on a high way—Carrying of flags to a temple

Where certain Lodhas who with the sanction of the public authorities, had been carrying flags to a temple in procession through a public street were attacked by persons who objected to the procession *held* that such attack constituted a disturbance of the performance of a religious ceremony punishable under section 296 of the Indian Penal Code

CERTAIN Lodhas of Bareilly, who had obtained the permission of the local authorities for that purpose, were carrying flags in a procession to a temple The procession was attacked on its way to the temple by sundry Muhammadans, and one of them, Masit, was charged for this under section 296 of the Indian Penal Code, convicted, and sentenced to six months' rigorous imprisonment. Masit appealed to the Sessions Judge, and, his appeal being dismissed, then came in revision to the High Court

Mr *Ahmad Karim* (for Mr *A H C Hamilton,*) for the applicant

The Government Advocate, (Mr *A E Ryves*), for the Crown

KNOX and PIGGOTT, JJ —Masit has been convicted of an offence under section 296 of the Indian Penal Code, and has been sentenced to rigorous imprisonment for six months He appealed to the Sessions Judge of Bareilly, and his appeal was dismissed He comes here in revision and raises the point whether the facts found constitute an offence under section 296 of the Indian Penal Code, the question of sentence is also put forward as being excessive

The facts found are that Masit joined with others in attacking a procession of Lodhas who were carrying flags to a temple with the sanction of the public authorities

The learned counsel who appeared for him in this Court raised the question whether the carrying of flags to a temple before they had been, so to speak, consecrated, could be considered the performance of a religious worship or religious ceremony

* Criminal Revision No 291 of 1911 from an order of F E Taylor Sessions Judge of Bareilly dated the 19th of May 1911

He argued that this section of the Indian Penal Code may fairly be supposed to have been framed upon the kindred English law to be found in 52 Geo III, Chapter 155, section 12, also 23 and 24 Victoria, Chapter 39 The case of *Vijiaraghava Chariar* v *Emperor* (1) and the case to be found in 3 Indian Cases, 981, were also cited and have been fully considered by us

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EMPEROR v MASIT

We have no reason to suppose that the English law is any guide The words of section 296 are quite clear As regards the Madras case we agree with what was said by Mr Justice BENSON

We are satisfied that the carrying of these flags to the temple was considered by the Lodhas as the performance of a religious ceremony They had applied to the public authorities and had got permission to carry the flags through the public streets The assembly which was engaged in the carrying of these flags was an assembly lawfully engaged in the performance of a religious ceremony

This being so, we see no reason for interfering, the sentence does not appear to us on the findings, to be excessive We dismiss the application

Application dismissed

APPELLATE CIVIL

1911
August 7

Before the Hon ble Mr H G Richards Chief Justice and Mr Justice Banerji

INDAR SEN SINGH (DEFENDANT) v HARPAL SINGH (PLAINTIFF) *

Hindu law—Mitakshara—Impartible property—Succession—Impartible property governed by the rule of primogeniture nevertheless joint property

Where ancestral property is impartible and is held by a single member of the family all the members of the family must be deemed to be joint in estate and the rule of succession to the property is the same as that which governs the case of partible property so that a junior member of the family who gets maintenance from the person holding the impartible estate succeeds upon his death to the estate by right of survivorship

Whatever may be the powers of alienation of the holder of an impartible estate the succession to it is governed not by the rule which applies to separate property but by the rule of survivorship Therefore the person who succeeds to

* First Appeal No. 400 of 1909 from a decree of Keshab Deo, Subordinate Judge of Jaunpur dated the 15th of September 1909

(1) (1902) I. L. R., 26 Mad., 554.

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the estate does not do so as the heir or legal representative of his predecessor and the estate cannot be regarded as the assets of the last previous holder.

Harpal Singh v. *Bishan Singh* (1) followed. *Raja of Kalahasti* v. *Achigadu* (2) and *Zamindar of Karvetnagar* v. *Trustee of Tirumalai* (3) dissented from.

THE suit out of which this appeal arose related to fifteen villages appertaining to the Singramau estate situated in the district of Jaunpur, which was admittedly an impartible estate held by a single person who succeeded to it according to the rule of primogeniture. Before the estate came to the plaintiff to this suit it was held by one Rai Randhir Singh, who died in 1895, leaving his widow, Thakurain Sonao Kunwar, in whose favour he had made a will before his death. His nephew, Sheopal Singh, who was his nearest male relative at the time of his death, brought a suit against Sonao Kunwar for possession of the estate. The suit was compromised, and a decree was passed in accordance with the compromise. Sheopal Singh died on the 27th of July, 1899, and Thakurain Sonao Kunwar, who survived him, died on the 20th of June, 1904. Thereupon Thakurain Lekhraj Kunwar, the widow of Sheopal Singh, brought a suit against the present plaintiff, Thakur Harpal Singh and others, for possession of the estate. She obtained a decree from the court of first instance on the 24th of February, 1906, but that decree was set aside by the High Court on the 29th of May, 1908. See I. L. R., 30 All., 207.

One Dilraj Kunwar obtained a money decree against Sheopal Singh on the 6th of January, 1897, and she made infructuous attempts to execute it. After the death of Sheopal Singh her legal representatives (she being dead) made an application for execution of the decree on the 4th of September, 1906, against Thakurain Lekhraj Kunwar, his widow, and on the 24th of March, 1907, caused the fifteen villages now in dispute to be attached. As the property was ancestral, the decree was transferred to the Collector for execution. That officer granted a lease of it to the defendant appellant on the 14th of March, 1908, for a term of four years. Meanwhile, Thakur Harpal Singh obtained his decree from this Court on the 29th of May, 1908, as stated above, but in spite of his protests the Collector delivered

(1) (1909) 6 A. L. J., 753. (2) (1905) I. L. R. 30 Mad. 454. (3) (1909) I. L. R. 32 Mad. 429.

possession of the fifteen villages to the defendant lessee on the 3rd of September, 1908 Thereupon the suit out of which this appeal has arisen, was instituted by the plaintiff, Thakur Harpal Singh, for a declaration of his right to the fifteen villages and for possession of those villages by avoidance of the lease granted to the defendant The Court of first instance (Subordinate Judge of Jaunpur) decreed the plaintiff s suit The defendant thereupon appealed to the High Court

Mr *W K Porter* (for Mr *B E O'Conor*) and Maulvi *Ghulam Mujtaba*, for the appellant

The court below has erred in treating the property in dispute as joint family property To impartible estates the doctrines applicable to a joint Hindu family only apply so far as their use is necessary to ascertain who the heir is Such property is not really joint property and does not pass to the heir by survivorship, but by succession The property must be deemed to be assets in the hands of the present holder The hypothesis of the property being joint was applied simply to ascertain the heir The idea was to keep women out If there were a right of survivorship, it would mean that a person would acquire an interest in the property at birth, but this was not the case Reference was made to *Doorga Persad Singh* v *Doorga Konwari* (1), *Kamakshi Ammal* v *Chakrapany Chettiar* (2), *Zamindar of Karvetnagar* v *Trustee of Tirumalai* (3) A joint property carried with it a right to partition and a disability as to alienation neither element was present in an impartible estate

The Hon'ble Pandit *Sundar Lal* (Dr *Satish Chandra Banerji* with him), for the respondent —

The estate is a joint estate in which each person as he is born, acquires an interest, only the mode of enjoyment is different One man keeps the bulk of the estate and the others only get maintenance The estate is joint under the *Mitakshara* law, only the shares are different The Privy Council have laid down that such an estate is not the separate estate of the Raja The ordinary law of partible estate applies with such variations as may

(1) (1879) I. L. R., 4 Calc., 190. (2) (1907) I. L. R., 30 Mad., 452.
(3) (1909) I. L. R. 32 Mad., 429

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have sprung up owing to custom The incidents of inheritance are the same The Privy Council have only given the holder the right to alienate In other respects the incidents are the same as those of joint family property In *Doorga Persad Singh* v *Doorga Konwari* (1) all that they held was that an impartible estate was impressed with the character of a joint family property, only it carried a right of alienation with it, *Raja Rup Singh* v *Rani Baisni* (2) Again no succession certificate was necessary in case of an impartible estate, because it was a case of survivorship The estate passed to us by survivorship and was not the last holder's assets in our hand

Mr *W K Porter*, in reply

RICHARDS, C J, and BANERJI, J—The suit out of which this appeal has arisen relates to fifteen villages appertaining to the Singramau estate situated in the district of Jaunpur, which is admittedly an impartible estate held by a single person, who succeeds to it according to the rule of primogeniture Before the estate came to the plaintiff to this suit it was held by Rai Randhir Singh, who died in 1895, leaving his widow, Thakurain Sonao Kunwar, in whose favour he had made a will before his death His nephew, Sheopal Singh, who was his nearest male relative at the time of his death, brought a suit against Sonao Kunwar for possession of the estate The suit was compromised, and a decree was passed in accordance with the compromise Sheopal Singh died on the 27th of July, 1899, and Thakurain Sonao Kunwar, who survived him, died on the 20th of June, 1904 Thereupon Thakurain Lekhraj Kunwar, the widow of Sheopal Singh, brought a suit against the present plaintiff, Thakur Harpal Singh, and others for possession of the estate She obtained a decree from the court of first instance on the 24th of February, 1906, but that decree was set aside by this Court on the 29th of May, 1908 The judgement of this Court is reported in I L R, 30 All, 407 An appeal from the decree of this Court is, we understand, now pending in the Privy Council *

One Dilraj Kunwar obtained a money decree against Sheopal Singh on the 6th of January, 1897, and she made infructuous

* The decision of the High Court was affirmed by the Judicial Committee on the 22nd November 1911 *Vide supra* p 65

(1) (1879) I. L. R., 4 Calc., 190 (2) (1885) I. L. R. 7 All. 10

attempts to execute it After the death of Sheopal Singh her legal representatives (she being dead) made an application for execution of the decree on the 4th of September, 1906, against Thakurani Lekhraj Kunwar, his widow, and on the 24th of March, 1907, caused the fifteen villages now in dispute to be attached As the property was ancestral, the decree was transferred to the Collector for execution That officer granted a lease of it to the defendant appellant on the 14th of March, 1908, for a term of four years Meanwhile, Thakur Harpal Singh obtained his decree from this Court on the 29th of May, 1908, as stated above, but in spite of his protests the Collector delivered possession of the fifteen villages to the defendant lessee on the 3rd of September, 1908 Thereupon the suit out of which this appeal has arisen, was instituted by the plaintiff, Thakur Harpal Singh, for a declaration of his right to the fifteen villages and for possession of those villages by avoidance of the lease granted to the defendant

The plaintiff asserts that as the estate is impartible, it must be deemed to be joint family property, although it was to be held for the time being by one of the members of the family, that although in the previous litigation it was held that it vested in Sheopal Singh, he had no absolute interest in it, that upon his death it passed to the plaintiff by right of survivorship, and that it is not liable to attachment in execution of a decree obtained against him in his personal capacity The plaintiff also urges that as he was not made a party to the proceedings relating to the execution of the said decree, the lease granted to the defendant is not binding on him

The defendant appellant, on the other hand, contends that the property in suit must be considered to be the assets of Sheopal Singh, that it was therefore liable to attachment and the lease granted to the defendant is valid, and that as the term of the lease has not yet expired, the plaintiff is not entitled to obtain possession

The court below has overruled these contentions and decreed the claim, relying mainly on the decision of this Court in *Harpal Singh v Bishan Singh* (1) In that case another

(1) (1909) 6 A L J., 753.

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creditor of Sheopal Singh, who held a money decree against him, applied, after his death, for execution of the decree against the present plaintiff Harpal Singh It was held by us that Harpal Singh succeeded to the estate by right of survivorship and not as heir or legal representative of Sheopal Singh holding his assets and that the estate in the hands of Harpal Singh could not be proceeded against by the creditor of Sheopal Singh as his assets

The learned counsel for the appellant, whilst admitting that this ruling is fatal to his appeal, has asked us to reconsider it in the light of the judgements of the Madras High Court in *Raja of Kalahasti* v *Achigadu* (1) and *Zamindar of Karvetnagar* v *The Trustee of Tirumalai* (2), which undoubtedly support his contention After carefully considering these rulings and the decisions of their Lordships of the Privy Council on the point we see no reason to alter the opinion we expressed in *Harpal Singh* v *Bishan Singh*, referred to above

In *Katama Natchiar* v *Raja of Shivagunga* (3) their Lordships of the Privy Council, referring to an impartible estate capable of enjoyment by only one member of the family at a time, held that "the rule of succession to it is that of the general Hindu law prevalent in that part of India with such qualifications only as flow from the impartible character of the subject Hence, if the zamindar, at the time of his death, and his nephews were members of an undivided Hindu family, one of the nephews was entitled to succeed to it" They accordingly applied the rule of survivorship in declaring who was the next heir to the estate Following this ruling their Lordships held, in *Doorga Persad Singh* v *Doorga Konwari* (4) that "the impartibility of the property does not destroy its nature as joint family property, or render it the separate estate of the last holder so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate" To the same effect is the ruling of their Lordships in *Raja Rup Singh* v *Rani Baisni* (5) where they held that "impartible ancestral estate is not,

(1) (1905) I L R 30 Mad 454.
(2) (1903) I L R 32 Mad 429
(3) (1863) 9 Moo I A., 539
(4) (1879) I L R 4 Calc 190
(5) (1885) I L R 7 All, 1

merely by reason of its being impartible, the separate estate of the single member of the undivided family on whom it devolves" In the case of *Stree Rajah Yanumula Venkayamah* v *Stree Rajah Yanumula Boochia Vankondora* (1) SIR JAMES COLVILE, in delivering the judgement of their Lordships said that "the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession of separate estate" It is unnecessary to quote other decisions of their Lordships The result of these decisions is that where ancestral property is impartible and is held by a single member of the family, all the members of the family must be deemed to be joint in estate, and the rule of succession to the property is the same as that which governs the case of partible property, so that a junior member of the family who gets maintenance from the person holding the impartible estate succeeds to the estate by right of survivorship

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It is said that this rule was departed from in the case of *Sartaj Kuari* v *Deoraj Kuari* (2), in which it was held that the holder of an estate impartible by custom and descending by primogeniture is competent, in the absence of a custom as to inalienability, to make a gift of a part of the estate This power was extended in the Pittapur case (3) to a will made by the holder of an impartible estate The contention of the learned counsel for the appellant is, and this seems to be the opinion of the learned Judges of the Madras High Court who decided the later cases referred to in an earlier part of this judgement, that the logical result of the decisions of their Lordships of the Privy Council in the two cases mentioned above is that the estate in the hands of the holder of it is separate estate Even if it be assumed that this is so, it is manifest from the judgements of their Lordships that they left untouched the question of succession to the estate In both the cases their Lordships only considered the question of the alienability of the estate In *Sartaj Kuari* v *Deoraj Kuari* the suit was brought by the son of the Raja who was in possession of the estate to set aside a gift made by him in favour of his junior wife It was held that there is not such co parcenary in an estate impartible by custom as, under

(1) (1870) 13 Moo, I A 333   (2) (1888) I L R, 10 All 272
(3) (1899) I L R 22 Mad 383

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the law of the Mitakshara governing the descent of ordinary property, attaches to a son on his birth SIR RICHARD COUCH who delivered the judgement of their Lordships, observed (p 286) — "Though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it which under the Mitakshara law is created by birth does not exist" Their Lordships were considering the power of a son to question an alienation by his father of part of the impartible estate and they held that he had no such power "The reason" they say, "for the restraint upon alienation under the law of the Mitakshara, is inconsistent with the custom of impartibility and succession according to primogeniture The inability of the father to make an alienation arises from the proprietary right of the sons" And they held that the property in the fraternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordship's opinion, so connected with the right to a partition that it does not exist where there is no right to it" Holding this view, they observed that, "as by custom the eldest son succeeds to the whole estate on the death of his father, it is difficult to reconcile this mode of succession with the rights of a joint family, and to hold that there is a joint ownership which is a restraint upon alienation" A we have said above, the sole question which their Lordships considered in that case was the question of the alienability of the estate, and they held that there was no such joint ownership as would be a restraint upon alienation They did not hold that the property is the separate absolute property of the holder of it and that the succession to it is to be regulated by the rule relating to the descent of separate property In the case mentioned above, *Sartaj Kuari v Deoraj Kuari*, this Court held that the property must be regarded as joint family property governed by the rules of the law of the Mitakshara save so far as the family custom or usage superseded these rules It is difficult to see what objection could be taken to this view of the position, having regard to the presumption of Hindu law and the decided cases This Court considered that the custom prevailing in the family did not authorize an alienation of the kind complained of by the plaintiff in the suit, which was admittedly in contravention of the rules

of Hindu law It was no doubt a necessary incident to the custom proved that the junior members of the family could not claim partition, and their Lordships considered that it followed that they *could not challenge an alienation made by the gaddi-nashin*, and this seems to have been the ground of their decision We do not, however, think that they decided or intended to decide that the view taken by this Court, viz, that the property was joint family property subject to the necessary incidents of the prevailing custom, was incorrect

As held in previous cases the property would devolve on the person who would have been entitled to succeed, if it were partible property, and this rule was not, as it seems to us, abrogated In the case of *Jogendro Bhupati* v *Nityanand Man Singh* (1), which was decided after the decision of *Sartaj Kuari's* case and in which that case was cited in the argument, their Lordships observed —"The fact of the Raj being impartible does not affect the rule of succession In considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to be looked at, and therefore the question in this case is what would be the right of succession supposing instead of being an impartible estate it were a partible one" Holding this view their Lordships applied the rule of survivorship It is noticeable that the judgement in this case also was delivered by SIR RICHARD COUCH, and he referred to the decision of their Lordships in the Shivagunga *case* There can be no doubt, upon the authorities, that whatever may be the powers of alienation of the holder of an impartible estate the succession to it is governed, not by the rule which applies to separate property, but by the rule of survivorship Therefore the person who succeeds to the estate does not do so as the heir or legal representative of his predecessor and cannot be said to hold his assets

This was the view we held in the case of *Harpal Singh* v *Bishan Singh* (2), and for the reasons stated above we adhere to that view It is in consonance with the ruling of the Calcutta High Court in *Kali Krishna Sarkar* v *Raghunath Deb* (3),

(1) (1890) I L R. 18 Calc 151 (2) (1903) 6 A. L. J., 753.
(3) (1903) I. L. R. 31 Calc., 224.

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and with that of the Madras High Court in *Nachiappa Chettiar* v *Chinnayasami Naicker* (1) decided by MOORE and SANKARAN NAIR, JJ, with which we are in full accord, and we are unable, with great respect, to agree with the later decisions of that court The property in dispute having passed to the plaintiff, Harpal Singh, by right of survivorship and not as heir or legal representative of Sheopal Singh, cannot be regarded as the assets of the latter and was not liable to attachment in execution of the decree obtained against him by Dilraj Kunwar The lease held by the defendant appellant is therefore void as against the plaintiff, and the appellant is not entitled to continue in possession by virtue of it

We are further of opinion, in concurrence with the court below, that the aforesaid lease is not binding on the plaintiff, inasmuch as he was not a party to the execution proceedings, in which it was granted by the Collector According to the decision of this Court in the suit between Thakurain Lekhraj Kunwar and Harpal Singh to which we have already referred, the latter was entitled to the Singramau estate after the death of Sheopal Singh. Therefore, if the decree-holder wished to proceed against any part of that estate, she ought to have made the plaintiff, Harpal Singh, a party to the execution proceedings As those proceedings were held against Thakurain Lekhraj Kunwar, the widow of Sheopal Singh, who has been declared to have no interest in the estate, they are not binding on the plaintiff According to the principle of the ruling of the Privy Council in *Mallikarjun* v *Narhari* (2) the lease granted in those proceedings is voidable as against the plaintiff and he is entitled to avoid it, as he seeks to do, in this suit

For these reasons we are of opinion that the decree of the court below is right We accordingly dismiss the appeal with costs

Appeal dismissed.

(1) (1906) I L R 29 Mad., 453 (2) (1908) I L R, 25 Bom., 337

REVISIONAL CRIMINAL

1911
August 14

Before Mr Justice Chamier

EMPEROR *v* NAUSHE ALI KHAN*

Act No XLV of 1860 (Indian Penal Code) section 379 – Theft—Removal of goods from a person s custody—Larceny

In order to constitute larceny there must be an intention to take entire dominion over the property, *i e*, the taker must intend to appropriate the property to his own use but there may be theft without an intention to deprive the owner of the property permanently

Hence where a person snatched away some books from a boy as he came out of school and told him that they would be returned when he came to his house *held* that the offence of theft had been committed *R* v *Dickinson* (1) *Prosonno Kumar Patra* v *Udoy Sant* (2) and *Queen Empress* v *Agha Muhammad Yusuf* (3) referred to

THE applicant in this case met a boy coming out of school and snatched some books which he was carrying away from him, telling him that he would get the books back if he came to the applicant's house for them The applicant was convicted by a Magistrate of the first class of theft under section 379 of the Indian Penal Code, and sentenced to a fine, and this conviction and sentence where upheld on appeal by the Sessions Judge Both courts found that the applicant's object was to get the boy to his house in order to commit an unnatural offence upon him The applicant came in revision to the High Court

Mr *R K Sorabji*, for the applicant

The Assistant Government Advocate (Mr *R Malcomson*), for the Crown

CHAMIER, J — This is an application for revision of an order of the Additional Sessions Judge of Moradabad, confirming an order of a Magistrate of the first class whereby the applicant was convicted of an offence under section 379, Indian Penal Code, and sentenced to pay a fine

The facts found are that the applicant snatched some books from a boy as he was coming out of school and told the boy that he would return the books if he came to his house Both the

* Criminal Revision No 365 of 1911 from an order of Pitambar Joshi officiating Additional Sessions Judge of Moradabad dated the 23rd of June 1911

(1) (1820) R. and R 420 (2) (1895) I L R 22 Calc. 669
(3) (1896) I L R 18 All, 68

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and with that of the Madras High Court in *Nachiappa Chettiar* v *Chinnayasami Naicker* (1) decided by MOORE and SANKARAN NAIR, JJ, with which we are in full accord, and we are unable, with great respect, to agree with the later decisions of that court The property in dispute having passed to the plaintiff, Harpal Singh, by right of survivorship and not as heir or legal representative of Sheopal Singh, cannot be regarded as the assets of the latter and was not liable to attachment in execution of the decree obtained against him by Dilraj Kunwar The lease held by the defendant appellant is therefore void as against the plaintiff, and the appellant is not entitled to continue in possession by virtue of it

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For these reasons we are of opinion that the decree of the court below is right We accordingly dismiss the appeal with costs

Appeal dismissed.

(1) (1906) I. L. R. 29 Mad., 453 (2) (1900) I L R 25 Bom. 337

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1911
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Act No XLV of 1860 (Indian Penal Code) section 379 – Theft—Removal of goods from a person's custody—Larceny

In order to constitute larceny there must be an intention to take entire dominion over the property, *i e* the taker must intend to appropriate the property to his own use but there may be theft without an intention to deprive the owner of the property permanently

Hence where a person snatched away some books from a boy as he came out of school and told him that they would be returned when he came to his house *held* that the offence of theft had been committed *R* v *Dickinson* (1), *Pro onno Kumar Patra* v *Udoy Sant* (2) and *Queen Empress* v *Agha Muhammad Yusuf* (3) referred to

THE applicant in this case met a boy coming out of school and snatched some books which he was carrying away from him, telling him that he would get the books back if he came to the applicant's house for them The applicant was convicted by a Magistrate of the first class of theft under section 379 of the Indian Penal Code, and sentenced to a fine, and this conviction and sentence where upheld on appeal by the Sessions Judge Both courts found that the applicant's object was to get the boy to his house in order to commit an unnatural offence upon him The applicant came in revision to the High Court

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CHAMIER, J —This is an application for revision of an order of the Additional Sessions Judge of Moradabad, confirming an order of a Magistrate of the first class whereby the applicant was convicted of an offence under section 379, Indian Penal Code, and sentenced to pay a fine

The facts found are that the applicant snatched some books from a boy as he was coming out of school and told the boy that he would return the books if he came to his house Both the

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(1) (1820) R. and R 420 (2) (1895) I L. R 22 Calc 669
(3) (1896) I L R., 18 All., 58

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Judge and the Magistrate have found that the object of the applicant was to get the boy into his house and commit an unnatural offence upon him

The question for decision is whether the applicant committed theft There seems no doubt that on the facts stated the applicant could not be convicted of larceny under the common law I mention this because my attention has been called to an old English case, in which, on facts not unlike those of the present case, the accused was acquitted In that case the prisoner took from a house in the night a young girl's bonnet and some other articles of her dress and carried them to a hay mow where he had twice had connection with her The jury thought that he took them in order that the girl might again go to the mow, and he might have another opportunity of soliciting her to repeat the connection It was held that the prisoner had not committed larceny *R* v *Dickinson* (1) In order to constitute larceny there must be an intention to take entire dominion over the property, i e, the taker must intend to appropriate the property to his own use

Under the Indian Penal Code 'whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft' The question is whether the applicant took the books 'dishonestly'—all the other ingredients of theft are present 'Dishonestly' is thus defined in section 24, Indian Penal Code —'whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another, is said to do that thing dishonestly' In section 23 wrongful gain and wrongful loss are defined thus —'Wrongful gain is the gain by unlawful means of property to which the person gaining it is not legally entitled, and wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled' It has been held in several cases that theft may be committed even where there is no intention to deprive the owner of the property permanently A familiar instance is that of a person who seizes the property of another in order to compel that other to pay a sum of money to which the former has

(1) (18?0) R and R

no claim, *Prosonno Kumar Patra* v *Udoy Sant* (1) There is a difference of opinion as to whether it is theft to take the property of another in order to compel payment of a just debt—*Queen-Empress* v *Agha Muhammad Yusuf* (2)—but it has never been suggested that there can be no theft unless there is an intention to deprive the owner of the property permanently In the present case there was 'wrongful gain' to the applicant and 'wrongful loss' to the school boy within the definition of those terms in the Code I must, therefore, hold that the applicant took the books dishonestly and that he was rightly convicted of theft under section 379, Indian Penal Code This application is dismissed

1911 EMPEROR v NAUSHE ALI KHAN

Application dismissed

Before Mr Justice Chamier

EMPEROR v GUR PRASAD GIR *

1911 October 18

Act No IX of 1890 (Indian Railways Act) section 125—Cattle left in charge of keeper allowed to stray on a railway line—Liability of owner

The owner of cattle which have been allowed to stray upon a railway in consequence of the negligence of the person actually in charge of them on the owner s behalf is not liable to punishment under section 125 (1) of the Indian Railways Act 1890 *Queen Empress* v *Andi* (3) followed

THIS was a case referred by the Sessions Judge of Jaunpur under section 438 of the Code of Criminal Procedure The facts of the case appear from the following order —

In this case the applicant has been fined Rs 5 under section 125 (1) of the Railways Act, as the owner of certain cattle which strayed on the railway line at Barasathi in this district Referring to the case of *Queen Empress* v *Andi* (3) which has been cited by the learned pleader for the applicant the learn d Magistrate says that it is not proved to his satisfaction that the applicant (who was not present when the trespass took place) had as a matter of fact appointed a person in charge of the cattle and that it was due to the negligence of that person that the cattle did stray On the evidence I think that the learned Magistrate had really no alternative but to be satisfied of both those matters Musai who was convicted and sentenced along with him corroborates applicant s assertion that he is his cow herd and that he was appointed by him to look after the cattle and further Musai admits negligence in having idly suffered another person to guard the cattle instead of looking after them himself There is no evidence to rebut these assertions of the two accused which are clearly true. The case consequently is on all fours with the

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* Criminal Reference No. 675 of 1911

(1) (1895) I. L. R. 22 Calc 669 (2) (1895) I. L. R. 18 All. 68
(3) (1894) I L R. 18 Mad. 239

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case of *Queen-Empress* v *Andi* and there is no ground for making the owner of the cattle liable

I would therefore report the case to the Hon'ble High Court with the recommendation that the conviction and sentence be set aside and the fine if paid be refunded The record will first be laid before the learned Magistrate for any remarks which he may wish to submit

The Magistrate's explanation was as below —

" As I have remarked in my judgement the Railways Act seems to make the owner of cattle trespassing on the railway responsible for the offence unless he can show that he has taken all reasonable care and precaution to prevent the trespass The appointment of a person to guard the cattle will not in my opinion relieve the owner of the responsibility unless it is proved that it was due to the negligence of that person that the cattle did stray The absence of the owner from the place where trespass takes place is immaterial.

In the present case the petitioner Gur Prasad Gir states that his cow herd Musai was in charge of the cattle but no evidence has been produced by him to support this allegation In fact he refused to summon or examine any witnesses on his behalf The assertion of Musai who was convicted and sentenced along with the petitioner though corroborating that of the applicant Gur Prasad Gir cannot be treated as evidence in his favour The evidence for the prosecution clearly shows that on the day of occurrence there was no person to look after the cattle. I think the burden of proving that the trespass took place owing to the negligence of Musai who is alleged to be the applicant s cow herd lay on the applicant. The bare assertions of the two accused uncorroborated as they are by independent evidence are not in my opinion, sufficient to exonerate him from the liability "

CHAMIER, J —Gur Prasad Gir was convicted under section 125 of the Railways Act On the evidence, there seems no doubt, that he had placed his co accused Musai in charge of his cattle and that it was due to the negligence of Musai that the cattle strayed on the railway Following the decision of the Madras Court, reported in *Queen Emperor* v *Andi* (1), I hold that Gur Prasad Gir should not have been convicted I set aside his conviction and direct that the fine, if paid by him, be refunded

Conviction set aside

(1) (1894) I L. R., 18 Mad., 283

Before Mr Justice Chamier

EMPEROR *v* ABDUL WAHID KHAN * 1911 *October* 25

Act No I of 1872 (*Indian Evidence Act*) *sections* 14 15—*Evidence—Act No XLV of* 1860 (*Indian Penal Code*) *section* 415—*Cheating—Evidence to show instances of cheating other than those charged inadmissible*

A person employed as a clerk in charge of the renewal of licences for hand carts received Rs 2 for each such renewal whereas he ought to have taken Rs 1 14 He was charged with cheating and evidence was produced showing that he had taken 2 annas in excess from persons other than those named in the charge *Held* that such evidence was inadmissible either under section 14 or under section 15 of the Evidence Act *Emperor* v *Debendra Prosad* (1) distinguished *Empress* v *M J Vyapoory Moodeliar* (2) referred to

THE facts of this case were as follows —

The accused was a clerk in the office of the Municipal Board of Pilibhit, and it was his duty to deal with applications for renewal of licences for hand carts He should have taken a licence fee of Rs 1 8 0 for each hand cart and 6 annas for the preparation of the *takhti* or board showing the number of the cart The case for the prosecution was that he had demanded and received Rs 2 from several applicants, and had thereby cheated each of them out of 2 annas

As it was not permissible to charge the accused with more than three such acts of cheating, the prosecution selected three complainants and produced evidence that each of them had been induced to pay two annas more than could properly have been demanded The prosecution produced also evidence that the accused had cheated a number of other applicants for licences The accused was convicted and appealed to the Sessions Judge on various grounds, one of which was that he had been prejudiced by the admission of evidence that he had taken two annas in excess from several persons other than those named in the charges framed against him The Sessions Judge held that the evidence complained of ought not to have been admitted and he has ordered a fresh trial

The Assistant Government Advocate (Mr *R Malcomson*) for the Crown

* Criminal Revision No. 533 of 1911 by the Local Government from an order of F E Taylor Sessions Judge of Bareilly dated the 8th of July 1911

(1) (1909) I L. R., 36 Calc 573 (2) (1881) I L. R., 6 Calc., 655

1911

EMPEROR v ABDUL WAHID KHAN

Maulvi *Muhammad Rahmat ullah,* for the applicant (accused)

CHAMIER, J —The accused was a clerk in the office of the Municipal Board of Pilibhit, and it was his duty to deal with applications for renewal of licences for hand carts He should have taken a licence fee of Rs 1 8 0 for each hand-cart and 6 annas for the preparation of the *takhti* or board showing the number of the cart The case for the prosecution was that he had demanded and received Rs 2 from several applicants, and had thereby cheated each of them out of 2 annas

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This is an application presented under the orders of the Local Government for revision of the orders of the Sessions Judge On behalf of the Crown it is contended that the evidence which has been ruled out by the Sessions Judge was rightly admitted either under section 14 or under section 15 of the Evidence Act It appears to me that section 15 cannot possibly apply to the case There is no question whether the accused's act was accidental or intentional or done with a particular knowledge or intention He admits and it is obvious that he knew what amount he was entitled to take from applicants for licences In support of the contention that the evidence is admissible under section 14, Mr *Malcomson* relied upon the decision of the Calcutta High Court in *Emperor* v *Debendra Prosad* (1) In that case the accused was charged with having

(1) (1909) I L R., 36 Calc , 573

cheated one Boodri by falsely representing that he was the *Dewan* of an estate and could obtain an appointment for him and thereby obtaining a sum of money as a pretended security deposit The cross examination foreshadowed the defence that the accused's intention at the time of the repre sentation was not dishonest The court held that evidence was admissible to show that at or about the same time the accused had had similar transactions with other persons which taken together showed that the accused's intention was dishonest and that the transaction with Boodri was only one of a systematic series of frauds I am unable to see how that case is any authority for the admission of the evidence which has been objected to in this case A ruling which applies closely to the present case is that in *Empress* v *M J Vyapoory Moodeliar* (1), where accused was charged with having received a bribe on three specific occasions and an attempt was made to prove that he had received bribes from the same firm on other occasions The evidence was ruled out on the ground that section 14 of the Evidence Act applies to cases where a particular act is more or less criminal or culpable according to the state of mind or feeling of the person who does it, not to cases where the question of guilt or innocence depends upon actual facts, and not upon the state of a man's mind or feeling

In the present case the accused knew what amount he was entitled to take, and the only question is whether he represented to the three complainants named in the charge that they were bound to pay two annas more, and on the strength of that representation induced each of them to pay Rs 2 instead of Rs 1 14 and put the difference in his pocket It appears to me that section 14 of the Evidence Act does not justify the admission of the evidence which has been objected to

But I do not understand why the Sessions Judge ordered a fresh trial He should have disposed of the case on the evidence which was admissible I would invite his attention to section 167 of the Evidence Act I set aside the order of the Sessions Judge and direct that the appeal be disposed of according to law

Order set aside

(1) (1881) I. L. R., 6 Calc., 655.

1911
October 25

Before Mr Justice Sir George Knox and Mr Justice Griffin

EMPEROR v AHMAD KHAN *

Act No III of 1867 (Public Gambling Act) section 12—' Mere game of skill'—Game of chance

Held that a game which is in fact only to a very slight extent a game of skill and almost entirely a game of chance is not a game which is excluded by reason of section 12 of the Gambling Act 1867 from the previous provisions of that Act *Hari Singh* v *King Emperor* (1) distinguished

THE facts of this case are fully set out in the order of the Sessions Judge which was as follows —

Ahmad Khan has been convicted under section 13 of the Gambling Act and sentenced to pay a fine of Rs 15 He has filed this application in revision on the ground that the game which he played was a game of skill

The accused played what is known as the ring game at Gajner fair He has a number of papers which prove that he used to apply for permission to the authorities to play this game he has two such orders from some tahsildar granting permission for the game to be played and saying that this is a game of skill He also possesses an order of the Joint Magistrate to the effect that if this is not a gambling game permission is granted He urges that he has been allowed to play this game for some years without interference In the Calcutta Law Journal, 1907, page 708 the Calcutta High Court have delivered a judgement dealing with an exactly similar case After describing the game at some length they decided that it was a game of skill This Court is not bound to follow that judgement and it is to be remarked that they have based their decision on a mistaken appreciation of what the game is

A table about 11 feet long 3½ feet broad and about 3½ feet high is used on this is attached a red baize cloth At intervals round the three sides of it there are tall brass pegs and at regular intervals over the whole surface of the table are fixed no fewer than 321 coins there being five rupees four eight annas pieces ten four anna pieces 168 two anna pieces and 134 one anna pieces Cups clocks and other such articles are scattered at intervals over the table Four feet away from this table a barrier 4 feet 6 inches high is fixed into the ground A competitor buys small brass curtain rings at a pice each and the game is that he may lean over the barrier and throw these rings upon the table if they go over a brass peg or if they encircle a coin he wins a prize The rings are very light and are made of round wire about ¼ inch in thickness With a great deal of practice it is possible that certain small amount of skill might be attained but practically it is a game of mere chance and certainly as presented to a number of holiday making peasants a simple game of chance and nothing else Section 13 does not contemplate relaxation of the law in favour of a game in which a certain amount of skill is attainable the law is relaxed if the game is one not of skill, but of mere skill; and I have no hesitation in deciding that this is not a game of mere skill The application is therefore rejected

* Criminal Revision No 60? of 1911 from an order of Austin K Sessions Judge of Cawnpore dated the 25th of July 1911

(1) (1907) 6 C L J, 708

'It must be noted with reference to the permission which the applicant professes to have obtained from various officials that the Magistrate's order was not simply a bare permission to him to play but simply ran that if it were not a gambling game it might be played The tahsildar's permission no doubt was direct but I fail to understand under what law the tahsildar was empowered to grant such permission nor could the fact that such permission had been obtained absolve the accused from the consequences of his act if as a matter of fact the game which he played was not a game of mere skill With reference to the last paragraph I direct that a copy of this order be sent to the District Magistrate for information'

Ahmad Khan thereupon applied in revision to the High Court

Mr *C Ross Alston*, for the applicant

The Assistant Government Advocate (Mr *R Malcomson*), for the Crown

CHAMIER, J —The applicant has been convicted under section 13 of the Public Gambling Act, 1867, of having played a game for money in a public place He was caught in the act of conducting what is known as the ring game It is fully described in the judgement of the Sessions Judge and it seems to me the same game as that which is described by MITTRA and FLETCHER, JJ, in the case of *Hari Singh v King Emperor*, decided on August 19th, 1907 (1) That case was decided under the Bengal Gambling Act, II of 1877, in section 10 of which as in section 13 of the Public Gambling Act, III of 1867, the expression "game of mere skill" is used The learned Judges of the Calcutta High Court said —"It seems to us that, although there is an element of chance in throwing a ring over the pin, the chief element of the game is one of skill" I am somewhat disposed to think that the element of chance in this case is so strong as to make it impossible to hold that the game is a mere game of skill At the same time there is no doubt that a considerable amount of skill might be attained at the game Having regard to what seems to have taken place in past with reference to this case I am inclined to think that there ought not to have been an order for the prosecution of the applicant In this case, however, the question must be decided whether the game was a mere game of skill or not In view of

(1) (1907) 6 C L. J., 703

1911

EMPEROR v AHMAD KHAN

the decision of the Calcutta High Court I refer this case to a bench of two Judges

The case coming on before a Division Bench, the following judgement was delivered —

KNOX and GRIFFIN, JJ —We have carefully considered the description given of the game which both the courts below held to be not a game of mere skill The learned counsel for the applicant who asks us to interfere with the view taken by these courts, has referred us to a Calcutta ruling in Criminal Revision No 771 of 1907, *Hari Singh* v *King Emperor* There is a material difference between the words used in section 10 of the Bengal Public Gambling Act and section 12 of Act No III of 1867, which is the Act which governs the case now before us We are by no means sure that the game which the Calcutta High Court Judges had under consideration was precisely the same as is described by the learned Sessions Judge of Cawnpore We are, of course, only concerned with the game described by the latter From the description so given we find ourselves unable to interfere We hold that the game described by the learned Sessions Judge of Cawnpore is not a game of mere skill The application is dismissed

Application dismissed

1911 October 26

APPELLATE CIVIL

Before Mr Justice Sir George Knox and Mr Justice Griffin

BISHAMBHAR NATH (PLAINTIFF) *v* BHULLO AND OTHERS (DEFENDANTS)*

Act (Local) No II of 1901 (Agra Tenancy Act) section 194—Lambardar—Suit by lambardar against co-sharers for excess of profits due to other co sharers and himself—Lambardar not agent of co sharers

Held that a lambardar is not the agent of the co-sharers generally so as to be entitled to sue on their behalf to recover profits due to some of them from other co-sharers holding *sir* and *khudkasht* lands in excess of their proper share.

THE facts of this case were briefly as follows —

The plaintiff was lambardar and the defendants were co sharers of a certain village The defendants held *sir* and *khud kasht* in

* First Appeal No 56 of 1911 from an order of H W Lyle District Judge of Agra dated the 23rd of January 1911.

excess of their share, i e, the income from these lands was greater than their share of profits The plaintiff, as lambardar, sued for the excess due to himself as a co sharer as well as for that due to the other co sharers The Assistant Collector gave a decree for the whole sum The District Judge, on appeal, held that the lambardar, as such, was not entitled to recover the excess due to the other co sharers, and remanded the suit His judgment was as follows —

' This is a suit for profits The lower court decreed the suit for a certain sum. The defendants appeal In my opinion the learned Assistant Collector s judg ment as well as the suit itself is based on misconception and confusion of ideas I shall so far as I can endeavour to make the position clear The plaintiff respondent is lambardar of the village The defendants appellants are co-sharers It is stated that the defendants hold *sir* and *khudkasht* in excess of the share in other words that the income which they draw from this *sir* and *khudkasht* is more than the whole of the profits to which they are entitled Now I do not think there can be any doubt that the plaintiff as a co-sharer can sue for his share for that excess if any

But he goes further than this he sues as lambardar for the excess due to other co sharers as well as to himself The position he takes up is that as lam bardar he is bound to distribute to each co sharer the proper amount of profits and that if any co sharer therefore has drawn more profits than he is entitled to do the lambardar is bound to recover the excess from him and distribute it to the co-sharers who are entitled to it In my opinion this is an extension of the rights and liabilities of a lambardar which is not warranted by law The ordinary functions of a lambardar are to collect the rents and to distribute the amounts so collected among the co-sharers in proportion to the share of each Besides the rent so collected he is also liable for any such sums as with due care and diligence he ought to have collected

But in some villages as in the present case land is held by co-sharers as *sir* or *khudkasht* The estimated income from this land is set off against their share of the profits but the lambardar does not collect that income from them and add it to the total amount for distribution The amount is not recoverable by the lambardar and he could not realize it if he would Now where a co-sharer holds *sir* and *khudkasht* which gives him an income in excess of his share of the profits the lambardar cannot be held liable to the other co-sharers for this excess He is not bound to nor indeed can he recover this amount in order to re-distribute it in proper proportion Take a simple instance A B C are co-sharers in equal shares of a village. A is lambardar C holds sir which brings him in an esti mated income of Rs 200 the rent of the land let to tenants is Rs 100 This amount is collected by A as lambardar Now it is clear that B can sue A for his one-third share of the Rs 100 which A has collected in his capacity of lamba dar It is equally clear that C has got Rs 100 in excess of his proper share and that both A and B are entitled to recover one-third of this, but A cannot sue C

1911

Bishambhar Nath v Bhullo

for the two-thirds share of Rs 100 due to B and himself with a view to distributing it among other three co-sharers in proper proportions As lambardar he is entitled to collect rents from tenants and to sue for these if necessary but what is due from C is not rent and A could not recover it from him. When a co sharer has realized an income in excess of his share of the profits there is no section which enables a lambardar to recover the balance from him with a view to re-distributing it again among the whole body of co sharers in proportion It follows from this that no co sharer can hold a lambardar responsible for income which another co sharer draws in excess of his share from *sir* or *khudkasht* land.

' The present plaintiff can sue as a co sharer for his share in the excess income if any drawn by the defendants for their *sir* and *khudkasht* land; but such suit is in no way concerned with his position as lambardar The introduction of the status of lambardar only raises confusion for the appellant wishes to set off certain rents due from tenants which he says the plaintiff as lambardar ought to have collected This would be practically to allow costs which would be due in a suit under section 164 to be set off against costs claimed under section 165 a procedure which is certainly not contemplated by the Tenancy Act I do not say that the plaintiff might not sue all the co sharers for a complete account and that in that case all the amounts due to and by him might not be gone into but that cannot certainly be done in a suit against one individual co-sharer The lower court s decision was based on a preliminary point in regard to which that decision has been set aside I must remand the case for decision on the merits I hold that as the suit is now proved the plaintiff can only sue as a co sharer for the amount of his own share all other points are open and it will also be open to the lower court to allow the plaint to be amended and to add parties should it think fit '

The plaintiff appealed

Dr *Tej Bahadur Sapru*, for the appellant —

The lambardar is responsible for the payment of the revenue and for the distribution of profits among the co sharers He can, therefore, sue for recovery of the excess profits realized by a co sharer, for the purpose of distributing the excess among the other co sharers Having regard to section 194 of the Agra Tenancy Act the lambardar must be treated as the agent of all the co sharers and can sue on their behalf, as he purports to do in this case The clause 'unless they have appointed an agent to act on behalf of them all" in section 194 (1) takes this case out of the ruling in *Udai Ram* v *Ghulam Husain* (1) The lambardar is the person who is authorized to represent them all The position which he actually occupies is that of their agent The appointment may be inferred from the course of conduct, and he must be deemed to have been appointed to act for them all.

(1) (1880) 2 Legal Remembrancer, High Court Series p 10

Pandit *Shiam Krishan Dar*, for the respondents, was not called upon

KNOX and GRIFFIN, JJ —The suit out of which this appeal arises is a suit brought by one Babu Bishambhar Nath who represents himself as lambardar of an entire mahal and is the owner of one half of it He sues the defendants for profits, and his allegation is that the defendants hold land *sir* and *khudkasht* in excess of what they are entitled to with reference to the shares owned by them The Revenue Court of first instance gave the plaintiff a decree as prayed for On appeal, the District Judge held that the plaintiff could only sue as a co sharer for the amount of his own share and could not sue for profits due to other co sharers He therefore set aside the decree of the court of first instance and remanded the suit for further trial In appeal before us it is contended that the view taken by the learned Judge is in error and that the plaintiff as lambardar can maintain the suit to recover his share and the shares of other co sharers out of excess money realized by the defendants, and this contention is said to be based upon the words contained in section 194 of the Local Act No II of 1901 It is urged before us that the lambardar must be deemed to be an agent appointed by the co sharers to act on behalf of them all We know of no authority derived from either statute or custom which confers such a power upon the lambardar, and we do not think that the words contained in section 194 can be strained into holding this meaning The appeal is dismissed with costs

Appeal dismissed

1911
October 26

Before the Hon ble Mr H G Richards Chief Justice and Mr Justice Banerji

GUR NARAIN (PLAINTIFF) v SHADI LAL AND OTHERS (DEFENDANTS)

Mortgage—Prior and subsequent incumbrancers—Third mortgagee paying off first mortgage and claiming priority as against second mortgagee—Presumption as to intention of third mortgagee

Where a mortgagee pays off prior incumbrances on the mortgaged property it is to be presumed that he does so with the intention of keeping these incumbrances alive and using them as a shield should occasion arise and he can so use them as much when he is a plaintiff suing for sale as when he is a defendant to an intermediate or subsequent mortgagee's suit If the payment is made in the form of leaving part of the money with the mortgagee to be paid to the prior mortgagees the subsequent mortgagee does not thereby become the agent of the mortgagor for the purpose of paying off the prior mortgages

Gokaldas Gopaldas v *Puranmal Premsukhdas* (1) *Dinobundhu Shaw Chowdhry* v *Jogmaya Dasi* (2) and *Jagatdhar Narain Prasad* v *A M Brown* (3) followed *Tufail Fatma* v *Bilola* (4) and *Baij Nath* v *Murlidhar* (5) dissented from.

THE facts of this case were briefly as follows —

The plaintiff sued to enforce a mortgage, dated the 25th of June, 1889 The defendants 8 to 16 held a mortgage of the 14th of April, 1888, in respect of which they demanded payment To this the plaintiff replied that when he took the mortgage in suit he had paid off two mortgages of earlier dates than the defendants' mortgage, and that he was entitled to claim priority over the defendants in respect of these The mortgage of 1889 contained the usual recital that a certain portion of the mortgage money had been "left with the mortgagee" to pay off the earlier mortgages, and this was in fact done The court of first instance refused the plaintiff the priority claimed by him in respect of these earlier mortgages The plaintiff appealed to the High Court

Dr *Tej Bahadur Sapru* (with him Mr *B E O'Conor*), for the appellant

Dr *Satish Chandra Banerji*, for the respondents

RICHARDS, C J and BANERJI, J —This appeal arises out of a suit brought to enforce a mortgage, dated the 25th of June, 1889 The defendants 8—16 held a mortgage, dated the 14th

First Appeal No 400 of 1909 from a decree of Prithvi Nath Subordinate Judge of Mainpuri, dated the 24th of August 1909

(1) (1884) I. L. R 10 Calc 1035
(2) (1901) I L R., 29 Calc., 154.
(3) (190) I L R., 33 Calc 1133
(4) (1901) I. L R. 27 All., 400
(5) Weekly Notes 1907, p 65

of April, 1888 The plaintiff, however, stated that when the mortgage of the 25th of June, 1889, was executed, two prior mortgages, one dated the 26th of June, 1886, and the other, dated the 28th of June, 1887, were paid off, and he accordingly claimed that to the extent of these mortgages, which were paid off, he had priority over the defendants 8—16, notwithstanding that their mortgage was prior in date

The lower court decided in favour of the defendants 8—16 and held that the plaintiff had no priority

Two questions have been argued in the present appeal, first, the question whether or not the plaintiff had in fact priority over the defendants 8—16, and secondly, assuming that he had such priority, whether he could enforce it in a suit instituted by himself as plaintiff

The facts are undisputed The plaintiff's mortgage provided that money sufficient to discharge the mortgage of the 26th of June, 1886 and the mortgage of the 28th of June, 1887, should be left with the mortgagee, who should pay off the mortgages and get the mortgage deeds handed over to him This was duly done, and the plaintiff is able to adduce in evidence the two mortgages of the 26th of June, 1886, and the 28th of June, 1887

In our opinion the plaintiff is entitled to priority in respect of the mortgages which he paid off in accordance with the terms of his mortgage deed It was clearly for the benefit of the mortgagee that the mortgages of the 26th of June, 1886, and the 28th of June, 1887, should be kept alive, and we think that a strong presumption arises that it was the intention of the mortgagee to keep these mortgages alive This view is in accordance with a vast amount of authority of this Court, and also with the view taken by their Lordships of the Privy Council in the case of *Gokaldas Gopaldas* v *Puranmal Premsukhdas* (1) and also in the case of *Dinobundhu Shaw Chowdhry* v *Jogmaya Dasi* (2) The law on the subject is fully set forth in the case of *Jagatdhar Narain Prasad* v *A M Brown* (3) and is well summarised at page 1154

(1) (1884) I L R 10 Calc 1035 (2) (1901) I L R 29 Cal , 154.
(3) (1906) I L R , 33 Calc , 1133

1911
October 26

Before the Hon ble Mr H. G Richards Chief Justice and Mr Justice Banerji

GUR NARAIN (PLAINTIFF) *v* SHADI LAL AND OTHERS (DEFENDANTS) *

Mortgage—Prior and subsequent incumbrancers—Third mortgagee paying off first mortgage and claiming priority as against second mortgagee—Presumption as to intention of third mortgagee

Where a mortgagee pays off prior incumbrances on the mortgaged property it is to be presumed that he does so with the intention of keeping these incumbrances alive and using them as a shield should occasion arise and he can so use them as much when he is a plaintiff suing for sale as when he is a defendant to an intermediate or subsequent mortgagee s suit If the payment is made in the form of leaving part of the money with the mortgagee to be paid to the prior mortgagees the subsequent mortgagee does not thereby become the agent of the mortgagor for the purpose of paying off the prior mortgages

Gokaldas Gopaldas v *Puranmal Premsukhdas* (1) *Dinobundhu Shaw Chowdhry* v *Jogmaya Dasi* (2) and *Jagatdhar Narain Prasad* v *A M Brown* (3) followed *Tufail Fatma* v *Bitola* (4) and *Baij Nath* v *Murlidhar* (5) dissented from.

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(3) (1903) I L R. 33 Calc 1133
(4) (1901) I L R 27 All., 400
(5) Weekly Notes 1907, p 85

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GUR NARAIN
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1911

GUR NARAIN v SHADI LAL.

It was argued on behalf of the respondents that the mortgagee must, under the circumstances of the present case, be deemed to have paid off the prior mortgages merely as the agent of the mortgagor, and that accordingly we ought to hold that those prior mortgages were absolutely extinguished as soon as payment was made Reliance is placed upon the decision in the case of *Baij Nath* v *Murlidhar* (1) and also in the case of *Tufail Fatma* v *Bitola* (2) It is no doubt true that expressions occur in the judgements in these cases suggesting that it was the opinion of the court that where money is left with the mortgagee to discharge prior mortgages, the mortgagee discharges these prior mortgages merely as agent for the mortgagor With all due respect, we consider that this view is inconsistent with a great number of cases decided in this Court and also with the view taken by their Lordships of the Privy Council in the cases to which we have already referred

The second question is the question whether or not the plaintiff is entitled to put forward in a suit instituted by himself the priority which for the purposes of this question it must be assumed that he has We think that it is not reasonable to hold that a person is entitled to put forward a right in a case in which he is sued and to successfully resist the suit, and that he cannot enforce the very same right as a plaintiff In the case to which we have referred, namely, the case of *Jagitdhar Narain Prasad* v *A M Brown* the plaintiff successfully put forward and enforced his claim under a prior mortgage which he had paid off in circumstances similar to those of the present case There is also an unreported ruling of this Court to the same effect, namely, *Thakur Rudar Singh* v *Param Sukh* (3) Reliance is placed upon another unreported decision of this Court, viz *Bhupat* v *Musammat Ganesha* (4) The circumstances of that case were not altogether on all fours with the facts of the present case, and the question now raised was not directly decided In our opinion there is no sound reason why a person who has priority by reason of having paid off a prior incum brance should not enforce that priority as plaintiff

(1) Weekly Notes 1907 p 85

(2) (1901) I L R, 27 All, 400

(3) S A No. 768 of 1909 decided on the 11th of May 1910

(4) S A No. 993 of 1910 decided on the 12th of April 1911

The result is that the appellant succeeds on the two questions which have been argued before us. There is no question as to the amount due upon the prior mortgages, and the plaintiff only seeks interest thereon at the rate mentioned in the later mortgage in his favour. We accordingly allow the appeal to this extent that we vary the decree of the court below by directing that the defendants, other than the defendants 8—16 and 20—23, do pay into Court the amount found due upon the mortgage, the basis of the claim, the said amount to be paid within four months from this date, together with the costs of this suit and future interest at the stipulated rate, up to the date fixed for payment and thereafter at the rate of six per cent per annum. If the said amount be paid, we direct that out of the money so paid in the plaintiff should be paid the costs of the suit, and the balance should be paid to the plaintiff and to the defendants Nos. 20—23, the plaintiff receiving half, and the defendants Nos. 20—23 the other half. We further direct that if payment be not made as ordered above, the defendants 8—16 shall have the right, within five months from this date, to redeem the mortgages of the 20th of June, 1886, and the 28th of June, 1887, by payment to the plaintiff and the defendants Nos. 20—23 of the sum of Rs. 13,926-5-5, together with interest, from the date of this suit to the time fixed for payment at the rate mentioned in the plaintiff's mortgage together with proportionate costs. In the event of the said amount being paid, the plaintiff will have the right to redeem the mortgage held by the defendants 8—16, dated the 14th of April, 1888, within three months from the date when the defendants Nos. 8—16 shall have redeemed the earlier mortgages of 1886 and 1887. Upon such payment being made the plaintiff shall be at liberty to bring to sale the mortgaged property for the aggregate amount of his own mortgage and the mortgage of the defendants 8—16 which he shall have so redeemed and out of the proceeds of such sale will be paid to the plaintiff (1) his costs of the suit, (2) the amount of the mortgage of the defendants 8—16 paid by him to the said defendants, and (3) a moiety of the amount of the mortgage of the 20th of June, 1889. The other half of the said amount will be paid to defendants 20—23, and the surplus, if any, to the persons entitled thereto. In the event of the

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defendants 8—16 not redeeming the prior mortgages of the 26th of June, 1886, and the 28th of June, 1887, the plaintiff shall be entitled to bring to sale the property comprised in his mortgage and out of the proceeds of the sale to realize in the first place the costs of this suit and in the next place a moiety of the amount due to the plaintiff and the defendants 20—23 on foot of the mortgages of the 26th June, 1886, and the 28th of June, 1887, the other moiety being payable to the defendants 20—23 Out of the balance, the defendants 8—16 will, having regard to the circumstances of this case, be entitled to the amount due in respect of their mortgage of the 14th of April, 1888 Out of what will remain after the making of the payments mentioned above, the plaintiff and the defendants 20—23 will be entitled to payment of the balance due upon foot of the mortgage of the 25th of June, 1889, the plaintiff getting half the said amount and the defendants 20—23 getting the other half between them, and in the last case the surplus, if any, will be paid to the persons entitled thereto The appellants will get their costs of this appeal

Appeal allowed

1911
October 30

Before Mr Justice Karamat Husain and Mr Justice Chamier

MAMRAJ AND ANOTHER (JUDGMENT DEBTORS) v BRIJ LAL CHAKRAVARTI AND OTHERS (DECREE HOLDERS)

Act No III of 1907 (Provincial Insolvency Act) sections 16 and 31—Civil Procedure Code (1908) order XXXIV rule 6—Application for decree over against two judgment-debtors one of whom had been declared insolvent

Where one of two mortgagors against whom a decree under order XXXIV rule 6 of the Code of Civil Procedure was otherwise obtainable had been declared an insolvent under the provisions of the Provincial Insolvency Act, 1907 but the other had not *Held* that the decree-holders could not be granted a decree over as against the insolvent but could only prove their debt in the insolvency proceedings *Barter v Dubeux and Company* (1) referred to

THE facts of this case are briefly as follows —

The appellant, Mamraj, was declared an insolvent on the 29th of July, 1908 Before the commencement, however, of the insolvency proceedings, the respondents instituted a suit against

First Appeal No 78 of 1911 from a decree of Mohan Lal Hukku Subordinate Judge of Cawnpore dated the 10th of December 1910

(1) (1881) L. R. 7 Q B. D., 413

the appellants and obtained a decree for sale on a mortgage on the 13th of February, 1909, and an order absolute for sale on the 8th of May, 1909 The mortgaged property was sold, but it failed to satisfy the debt On the 10th of December, 1910, an application was made under order XXXIV, rule 6, of the Code of Civil Procedure It was resisted on the ground that the appellant Mamraj having been declared an insolvent, no decree under the said order XXXIV, rule 6, could be passed against him The Subordinate Judge, however, overruled the objection and gave the respondent a decree

Munshi *Govind Prasad*, for the appellants, contended that the appellant Mamraj having been declared an insolvent, he could not be made personally liable He relied on section 16 (2) and (5) and section 31 (1) and (6) of Act III of 1907 If execution proceedings are taken out against an insolvent, the object of the Legislature would be defeated The Court below had no power to pass a decree under order XXXIV, rule 6, of the Code of Civil Procedure, after Mamraj had been declared an insolvent

Babu *Girdhari Lal Agarwala* (with him Munshi *Gulzari Lal*), for the respondent, submitted that there was nothing in the provisions of the Insolvency Act to prevent a Court from passing a decree under order XXXIV, rule 6, of the Civil Procedure Code, when as a matter of fact, the suit for sale on the mortgage was instituted prior to the commencement of insolvency proceedings

Munshi *Govind Prasad*, in reply

CHAMIER, J —The respondents, who held a mortgage of certain property from the appellant, Mamraj, brought a suit upon the mortgage against Mamraj and his son, Hanuman Das, and obtained a decree for sale which was made absolute on May 8th, 1909 The mortgaged property was sold, but the proceeds of the sale were not sufficient to satisfy the decree After the institution of the suit but before the decree was passed, Mamraj was adjudicated an insolvent and a receiver was appointed. The respondents applied for a decree for the balance still due to them making the receiver a party to the proceedings The application was resisted on the ground that as the respondents had enforced their security and recovered a certain amount they could

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Mamraj v. Brij Lal Chakravarti

claim nothing more The objection was overruled Hence this appeal

The objection is obviously not sustainable as regards the appellant Hanuman Das, for he has not been adjudicated an insolvent, and the respondents are clearly entitled to continue their suit against him The respondents as secured creditors were entitled under section 31 of the Provincial Insolvency Act to realize their security, as they did, and to prove for the balance of their claim The question is whether the respondents are entitled to continue their suit against Mamraj and obtain a decree against him under order XXXIV, rule 6 Section 16 of the Insolvency Act provides that on the making of an order of adjudication no creditor to whom the insolvent is indebted in respect of any debt provable under the Act shall, during the pendency of the insolvency proceedings, have any remedy against the property or person of the insolvent in respect of the debt or commence any suit or other legal proceeding except with the leave of the Court and on such terms as the Court may impose When the sole defendant to a suit for the recovery of a debt is adjudicated an insolvent, it seems clear that the proper course is to stay the suit and leave the plaintiff to prove his debt in the insolvency proceedings This has been held to be the proper course in England—See *Barter v. Dubeux and Co* (1) In the same case it was pointed out that where there is an action against two defendants and one becomes bankrupt, it being a claim against both, of course, the one who does not become bankrupt cannot be made liable unless the action goes on, and such a case is governed by a rule corresponding to order XXII, rule 10, and the trustee in bankruptcy may be made a party Judgement is not given against the trustee or that he pay out of the estate, but judgement being against the other defendant, the plaintiff is at liberty to prove in the bankruptcy the amount of the claim established, and there the trustee is a party because it is necessary both as against the bankrupt's estate and the other defendant that the action should go on Many of the provisions of the Indian Insolvency Act, including section 16, are taken from the English Bankruptcy Act, and where the provisions correspond, the decisions of the English courts may properly be

(1) (1881) L. R., 7 Q. B. D., 413.

referred to as guides to the construction of the Indian Act The respondents' application under order XXXIV, rule 6, was a continuation of their suit for the recovery of the mortgage money A decree under order XXXIV, rule 6, is plainly a remedy within the meaning of section 16 of the Insolvency Act, therefore the respondents are not entitled to obtain such a decree against the appellant Mamraj I would, therefore, allow this appeal in part and set aside the decree of the court below so far as it affects the appellant Mamraj or his property or the receiver, and leave the respondents to prove their claim in the insolvency proceedings against the estate of Mamraj The decree of the court below should stand as against Hanuman Das but not so as to make him personally liable for the amount I would make no order as regards the cost of this Court

KARAMAT HUSAIN, J —I agree

BY THE COURT —The order of the court is that the decree of the court below is set aside so far as it affects Mamraj or his property or the receiver The respondents are left to prove their claim in the insolvency proceedings against the estate of Mamraj The decree of the court below stands as against Hanuman Das, but he will not be personally liable for the amount decreed We make no order as regards the costs of this court

Decree modified

Before the Hon ble Mr H G Richards Chief Justice and Mr Justice Banerji

1911 October 30

ZAIB UN NISSA BIBI (PLAINTIFF) v THE MAHARAJA OF BENARES AND OTHERS (DEFENDANTS) *

Act No IX of 1908 *(Indian Limitation Act) section* 19—*Limitation—Acknowledgment by agent—Law to be applied to test the validity of an acknowledgment*

Held that the criterion to be applied to test the validity of an acknowledgment of liability put forward by a plaintiff as extending the period of limitation in his favour is the law in force at the time when the plaintiff's suit would otherwise have been time-barred and not that in force at the time when the acknowledgment relied upon was made *Mohesh Lal* v *Busunt Kumaree* (1) *Rahman Bibi* v *Hulasa Kuar* (2) and *Hanuman Prasad* v *Raghunandan Singh* (3) referred to

This was a suit for redemption of a mortgage, dated the 21st of November, 1823 The plaintiff instituted the suit on the 30th

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* Second Appeal No 1116 of 1910 from a decree of Muhammad Ali, District Judge of Mirzapur dated the 22nd of July 1910 confirming a decree of Udit Narain Sinha, Subordinate Judge of Benares dated the 21st of May 1910

(1) (1880) I. L. R 6 Calc 340 (2) (187) I. L. R. 1 All 642
(3) (1904) 1 A. L. J., 855

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ZAIB UN NISSA BIBI v. THE MAHARAJA OF BENARES

September, 1909, whereas 60 years expired on the 21st of November, 1883 The plaintiff alleged that by reason of a certain acknowledgment made by the agent of the defendant the suit was within time She relied on a plaint filed on behalf of the Maharaja on the 4th of March, 1868, for possession of this land on the ground that the defendant was a mortgagee of the part now claimed and vendee of the other The courts below held that the acknowledgment was no acknowledgment in law and did not save limitation and dismissed the suit

The plaintiff appealed

The Hon'ble Pandit *Moti Lal Nehru*, for the appellant —

The first question is whether the suit would be governed by Act No XIV of 1859 or by Act No XV of 1877 The latter Act clearly authorizes an agent to make the acknowledgment The conditions are that the agent must be authorized to acknowledge and the debt at the time must not be barred by limitation The two conditions have been fulfilled The debt was not barred till 1883 when the Act of 1877 was in force The law which governed the case was the one in force at the date of institution We have nothing to do with the law which was in force at the date of the acknowledgment *Mohesh Lal* v *Busunt Kumaree* (1) The cases relied on by the court below are not applicable as they were cases of debts barred before the Act came into force The moment the new Act came into force, it gave the plaintiff a fresh start It was not giving retrospective effect to the Act The case of *Rahmani Bibi* v *Hulasa Kuar* (2) is against me on the assumption that the date of the mortgage was as alleged by the respondent in that case If the correct date was that alleged by the defendant, viz, 70 years before the institution of the suit, the claim for redemption would be barred before the new Act came into force

Munshi *Gokul Prasad* (with The Hon'ble Pandit *Sundar Lal*), for the respondent —

The acknowledgment was made in 1868 when the Act of 1859 was in force The plaintiff has to bring the acknowledgment within that Act Acknowledgment under that Act by an agent did not save limitation Then this acknowledgment was not legal

(1) (1883) I. L. R. 6 Calc., 340 (2) (1878) I. L. R., 1 All., 642

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The cases lay down that the right will be gone. I rely on *Rahmani Bibi* v. *Hulasa Kuar* (1), and *Hanuman Prasad* v. *Raghunandan Singh* (2). In the Act of 1877, section 19 says that the acknowledgment must be made by an agent duly authorized in that behalf. Duly authorized agent must be authorized to make the acknowledgment. The power must be given in the power of attorney. General authority may be enough, but there must be an authority to do the act. The suit in which the acknowledgment is said to have been made was filed in the name of the agent who said that the mortgage was in favour of his master.

The Hon'ble Pandit *Moti Lal Nehru* was not called upon.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit for redemption of a mortgage, dated the 21st of November, 1823. The courts below have dismissed the suit on the ground that the claim is time barred. No doubt having regard to the date of the mortgage the claim would be time barred unless the plaintiff could invoke in aid, as he seeks to do, an acknowledgment said to have been made on the 4th of March, 1868, whereby the mortgage in question was acknowledged by an agent of the predecessor in title of the defendant. This acknowledgment was made when Act No. XIV of 1859 was in force, and under that Act an acknowledgment by an agent was not sufficient to save the operation of limitation. This was held by their Lordships of the Privy Council, whose decision was followed by this and other courts.

It is, however, contended on behalf of the appellant that as the mortgage was made in 1823 and the right to bring a suit had not become extinct when Act No. IX of 1871 and Act No. XV of 1877 came into operation, the acknowledgment would, under the provisions of those Acts, give a new start for the computation of limitation if made by an agent duly authorized in that behalf. In our opinion this contention is well founded. No doubt if the plaintiff had to rely on the acknowledgment in a suit which was governed by Act XIV of 1859 an acknowledgment by an agent would not be sufficient, but at the time when the suit of the plaintiff was instituted, the present law of limitation was in force, an

(1) (1878) I. L. R., 1 All., 642. (2) (1904) 1 A. L. J. R., 355, 257.

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ZAIB UN NISSA BIBI v. THE MAHARAJA OF BENARES

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The plaintiff appealed

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Munshi *Gokul Prasad* (with The Hon'ble Pandit *Sundar Lal*), for the respondent —

The acknowledgment was made in 1868 when the Act of 1859 was in force The plaintiff has to bring the acknowledgment within that Act Acknowledgment under that Act by an agent did not save limitation Then this acknowledgment was not legal

(1) (1880) I. L. R. 6 Calc., 340 (2) (1878) I. L. R., 1 All., 611

The cases lay down that the right will be gone. I rely on *Rahmani Bibi* v. *Hulasa Kuar* (1), and *Hanuman Prasad* v. *Raghunandan Singh* (2). In the Act of 1877, section 19 says that the acknowledgment must be made by an agent duly authorized in that behalf. Duly authorized agent must be authorized to make the acknowledgment. The power must be given in the power of attorney. General authority may be enough, but there must be an authority to do the act. The suit in which the acknowledgment is said to have been made was filed in the name of the agent who said that the mortgage was in favour of his master.

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RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit for redemption of a mortgage, dated the 21st of November, 1823. The courts below have dismissed the suit on the ground that the claim is time barred. No doubt having regard to the date of the mortgage the claim would be time-barred unless the plaintiff could invoke in aid, as he seeks to do, an acknowledgment said to have been made on the 4th of March, 1868, whereby the mortgage in question was acknowledged by an agent of the predecessor in title of the defendant. This acknowledgment was made when Act No. XIV of 1859 was in force, and under that Act an acknowledgment by an agent was not sufficient to save the operation of limitation. This was held by their Lordships of the Privy Council, whose decision was followed by this and other courts.

It is, however, contended on behalf of the appellant that as the mortgage was made in 1823 and the right to bring a suit had not become extinct when Act No. IX of 1871 and Act No. XV of 1877 came into operation, the acknowledgment would, under the provisions of those Acts, give a new start for the computation of limitation if made by an agent duly authorized in that behalf. In our opinion this contention is well founded. No doubt if the plaintiff had to rely on the acknowledgment in a suit which was governed by Act XIV of 1859 an acknowledgment by an agent would not be sufficient, but at the time when the suit of the plaintiff was instituted, the present law of limitation was in force, an

(1) (1878) I. L. R., 1 All., 642. (2) (1904) 1 A. L. J. R., 355, 357.

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ZAIB UN NISSA BIBI v. THE MAHARAJA OF BENARES

therefore the suit would be governed by that law. The provisions of the present Act, namely, Act No. IX of 1908, are similar to those of Act No. IX of 1871 and Act No. XV of 1877 in this respect. If Act No. XIV of 1859 had never been enacted, the plaintiff could, under the provisions of the later Act mentioned above take advantage of the acknowledgment made in 1868, if it was an acknowledgment by an agent duly authorized to make it. The mere fact that the Act of 1859 was for some time in force would not deprive the plaintiff of the benefit of the provisions of the later Acts. This was held by the High Court of Calcutta in *Mohesh Lal* v. *Busunt Kumaree* (1) in which the case law on the subject is set forth, including the case of *Valia Tamburatti* v. *Vira Rayan* (2).

The learned vakil for the respondent has relied on the case of *Rahmani Bibi* v. *Hulas Kuar* (3). In that case the point now raised was neither discussed nor decided. The case of *Hanuman Prasad* v. *Raghunandan Singh* (4) is distinguishable, as in that case the claim on the mortgage had become time barred before the Limitation Acts of 1871 and 1877 came into operation.

For these reasons we are of opinion that the courts below were wrong in holding that the acknowledgment relied on by the plaintiff, namely, that of the 4th of March, 1868, could not, if made by an agent duly authorized, be availed of for the purpose of saving the operation of limitation. Assuming that the suit filed on the 4th of March, 1868, on behalf of the predecessor in title of the defendant was filed and verified by an agent of the plaintiff's predecessor in title, the statement therein contained would be an acknowledgment by an agent duly authorized within the meaning of section 19 of the Limitation Act of 1908.

We accordingly allow the appeal, set aside the decrees of the courts below and remand the case to the court of first instance under order XLI, rule 23, of the Code of Civil Procedure, for trial on the merits. The court will have to determine whether the acknowledgment in question was an acknowledgment made by an agent of the plaintiff's predecessor in title duly authorized

(1) (1880) I. L. R. 6 Calc. 340. (3) (1878) I. L. R. 1 All. 642.
(2) (1876) I. L. R. 1 Mad. 228. (4) (1904) 1 A. L. J. 225.

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in that behalf within the meaning of the Limitation Act, and in the event of finding that question in favour of the plaintiff it will try the other questions raised in the suit

Appeal decreed

1911
August 1

Before the Hon ble Mr H G Richards Chief Justice and Mr Justice Banerji

JAGANNATH PRASAD (PLAINTIFF) *v* BADRI PRASAD AND OTHERS (DEFENDANTS)*

Partition—Abadi not formally divided but separate portions thereof taken possession of by the various owners—Agreement amongst owners—Rights of owners as to portions in possession of each

A village was divided into three mahals with the exception of the *abadi* as to which it was found that it had not been divided between the mahals by demarcation on the village map or on the spot, but the owners of the mahals had been in separate possession of portions of it

Held that the only possible inference from this finding was that the parties had agreed among themselves as to their possession of the *abadi* and that so long as the agreement continued each party was entitled to use the portion in his possession in any way he pleased so long as such user or possession did not interfere with the user or possession of the owners of the other mahals *Kumudini Mazumdar* v *Rasik Lal Mazumdar* (1) followed

THIS was an appeal under section 10 of the Letters Patent from a judgement of Karamat Husain, J The facts of the case sufficiently appear from the judgement under appeal which was as follows —

' The plaintiff brought an action against the defendants and asked for the following reliefs —'It may be declared that the plaintiff is the owner and in possession of the land in dispute that the defendants have no right whatever to interfere with and offer obstructions to the plaintiff that they have no right to offer obstructions to the plaintiff in building walls &c on the land in dispute and that they have no right of any kind whatever against the plaintiff The main defence was that the property was joint The court of first instance decreed the plaintiff s claim and that decree was affirmed by the lower appellate court. That court found as follows — I find that the land in suit is part of the *abadi* of mauza Sisolar which consists of three mahals and that this *abadi* has not been divided between the mahals by demarcation on the village map or on the spot but that the owners of the mahals have been in separate possession of portions of it and that the plaintiff has been in possession of the land in suit The defendants have no right to prevent him putting a wall round it

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* Appeal No. 42 of 1911 under section 10 of the Letters Patent

(1) (1906) 11 C W N 517

1911

JAGANNATH PRASAD v BADRI PRASAD

'A second appeal is preferred by the defendants and it is argued by their learned counsel that the property being joint the plaintiff has no right to build and that he is not entitled to the decree given him This objection is in my opinion sound The learned vakil for the respondent however, argues that having regard to the law laid down in *Madan Mohun Shaha* v *Rajab Ali* (1) the decree of the lower appellate court should not be disturbed. The ruling relied on by the learned vakil does not go the length of laying down that a co-sharer who is in exclusive possession of a portion of joint property can build upon it without the consent of the co sharers

I therefore allow the appeal set aside the decrees of the courts below and dismiss the plaintiff s suit with costs in all courts

The plaintiff appealed

Munshi *Damodar Das*, for the appellant

Mr *M L Agarwala*, for the respondents

RICHARDS, C J and BANERJI, J —This appeal arises out of a suit in which the plaintiff claimed a declaration that he was entitled to continue in possession of a plot of land in the *abadi* and that the defendants had no right to interfere with his building a wall The court of first instance decreed the suit The lower appellate court affirmed that decree On appeal to this Court, however, the decrees of the lower courts were set aside and the plaintiff's suit dismissed The findings of the lower appellate court, which are binding upon us, are quoted in the judgement of the learned Judge of this Court as follows —

I find that the land in suit is part of the *abadi* of mauza Sisolar which consists of three mahals and that this *abadi* has not been divided between the mahals by demarcation on the village map or on the spot but that the owners of the mahals have been in separate possession of portions of it and that the plaintiff has been in possession of the land in suit'

The clear meaning of this finding is that the owners of each mahal have a separate portion of the *abadi* of which they are in exclusive possession This was the defendants' own case in the lower appellate court The dispute there was that the defendants claimed that the particular plot on which plaintiff wanted to build the wall was in their possession and not in the possession of the plaintiff The learned Judge of this Court says —"A second appeal is preferred by the defendants, and it is argued by their learned counsel that the property being joint, the plaintiff has no right to build and he is not entitled to the decree given him. This objection is in my opinion sound." It seems to us

(1) (1900) I. L. R., 28 Calc., 223

1911

JAGANNATH PRASAD v BADRI PRASAD

that the learned Judge altogether lost sight of the finding that the owners of the different mahals were all in exclusive possession of particular plots The only inference which can be drawn from this is that the parties by mutual consent allowed the owners of the different mahals to separately enjoy the different parts of the *abadi*, in other words, that there was an agreement between the parties This agreement must be inferred from the action of the parties themselves So long, therefore, as this agreement continues, the parties in exclusive possession of a part of the *abadi* are entitled to use it and enjoy it in such way as they please, so long as such use or possession does not interfere with the use of owners of other mahals of what is in their separate possession This principle was fully recognized in the case of *Kumudini Mazumdar* v *Rasil Lal Mazumdar* (1) We think that the decisions of the courts below were correct and ought to be restored We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs of both appeals to this court

Appeal allowed

REVISIONAL CRIMINAL

1911
October 20

Before Mr Justice Chamier

EMPEROR v SARDAR AND OTHERS.*

Criminal Procedure Code section 423—Appeal—Power of appellate court to alter finding of acquittal into one of conviction

An appellate court can under section 423 of the Criminal Procedure Code in an appeal from a conviction alter the finding of the lower court and find the appellant guilty of an offence of which the lower court has declined to convict him. *Queen Empress* v *Jabanulla* (2) followed

IN this case several persons were charged by a Magistrate with offences under section 147 read with section 225 and section 353 of the Indian Penal Code The Magistrate convicted six of them under section 147 read with section 225 of the Code and sentenced them to three months' rigorous imprisonment.

* Criminal Revision No 505 of 1911 from an order of W J D Burkitt, Sessions Judge of Saharanpur dated the 7th August 1911

(1) (1906) 11 C. W N. 51   (2) (1896) I L. R. 23 Calc. 975

1911

JAGANNATH PRASAD v BADRI PRASAD

A second appeal is preferred by the defendants and it is argued by their learned counsel that the property being joint the plaintiff has no right to build and that he is not entitled to the decree given him This objection is in my opinion sound The learned vakil for the respondent however argues that having regard to the law laid down in *Madan Mohun Shaha* v *Rajab Ali* (1) the decree of the lower appellate court should not be disturbed The ruling relied on by the learned vakil does not go the length of laying down that a co sharer who is in exclusive possession of a portion of joint property can build upon it without the consent of the co sharers

I therefore allow the appeal set aside the decrees of the courts below, and dismiss the plaintiff s suit with costs in all courts'

The plaintiff appealed

Munshi *Damodar Das*, for the appellant

Mr *M L Agarwala*, for the respondents

RICHARDS, C J and BANERJI, J —This appeal arises out of a suit in which the plaintiff claimed a declaration that he was entitled to continue in possession of a plot of land in the *abadi* and that the defendants had no right to interfere with his building a wall The court of first instance decreed the suit The lower appellate court affirmed that decree On appeal to this Court, however, the decrees of the lower courts were set aside and the plaintiff's suit dismissed The findings of the lower appellate court, which are binding upon us, are quoted in the judgement of the learned Judge of this Court as follows —

'I find that the land in suit is part of the *abadi* of mauza Sisolar which consists of three mahals and that this *abadi* has not been divided between the mahals by demarcation on the village map or on the spot but that the owners of the mahals have been in separate possession of portions of it and that the plaintiff has been in possession of the land in suit'

The clear meaning of this finding is that the owners of each mahal have a separate portion of the *abadi* of which they are in exclusive possession This was the defendants' own case in the lower appellate court The dispute there was that the defendants claimed that the particular plot on which plaintiff wanted to build the wall was in their possession and not in the possession of the plaintiff The learned Judge of this Court says —"A second appeal is preferred by the defendants, and it is argued by their learned counsel that the property being joint, the plaintiff has no right to build and he is not entitled to the decree given him This objection is in my opinion sound" It seems to us

(1) (1900) I. L. R. 28 Calc 223.

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JAGANNATH PRASAD v BADRI PRASAD

that the learned Judge altogether lost sight of the finding that the owners of the different mahals were all in exclusive possession of particular plots The only inference which can be drawn from this is that the parties by mutual consent allowed the owners of the different mahals to separately enjoy the different parts of the *abadi*, in other words, that there was an agreement between the parties This agreement must be inferred from the action of the parties themselves So long, therefore, as this agreement continues, the parties in exclusive possession of a part of the *abadi* are entitled to u e it and enjoy it in such way as they please, so long as such use or possession does not interfere with the use of owners of other mahals of what is in their separate possession This principle was fully recognized in the case of *Kumudini Mazumdar* v *Rasik Lal Mazumdar* (1) We think that the decisions of the courts below were correct and ought to be restored. We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with co ts of both appeals to this court

Appeal allowed

REVISIONAL CRIMINAL

1911
October 20

Before Mr Justice Chamier

EMPEROR *v* SARDAR AND OTHERS.

Criminal Procedure Code section 423—Appeal—Power of appellate court to alter finding of acquittal into one of conviction

An appellate court can under section 4 3 of the Criminal Procedure Code in an appeal from a conviction alter the finding of the lower court and find the appellant guilty of an offence of which the lower court has declined to convict him. *Queen-Empress* v *Jabanulla* (2) followed

IN this case several persons were charged by a Magistrate with offences under section 147 read with section 225 and section 353 of the Indian Penal Code The Magistrate convicted six of them under section 147 read with section 225 of the Code and sentenced them to three months' rigorous imprisonment.

* Criminal Revision No 503 of 1911 from an order of W J D Burkitt Sessions Judge of Saharanpur dated the 7th August 1911

(1) (1906) 11 C. W N. 51[?] (2) (1896) I L. R. [?] Cal [?]75

1911

Emperor v. Sardar.

He also convicted two out of the six, Sardara and Wazira, under section 353 of the Code and sentenced them to three months' rigorous imprisonment each On appeal the Sessions Judge maintained the conviction of Sardara and Wazira under section 353 and convicted the remaining appellants also under section 353, instead of under section 147 read with section 225 The convicts applied to the High Court in revision urging that it was not open to the appellate court to convict under section 353 of the Code such of the applicants as had been charged with, but not convicted of, the offence therein defined by the Magistrate

Mr *C Dillon*, for the applicants

The Assistant Government Advocate (Mr *R Malcomson*), for the Crown

CHAMIER, J —Hargu obtained a warrant from a Magistrate under section 100 of the Code of Criminal Procedure for the production of a woman named Daulatia, who was said to be in illegal confinement The Sub Inspector, some constables and the chaukidar went to get the warrant executed The appellants, Wazira and Sardara, refused to allow the police to search the house in which the woman was said to be concealed Ultimately she was brought to the door, but they declined to give her up to the police Later, Sardara, Wazira and others made an attack upon Hargu and Mula There was also an attack of some kind on the police The first court framed a charge against all the accused under sections 147/225 and 353 of the Indian Penal Code In the result it sentenced six of them, including Sardara and Wazira, to three months' rigorous imprisonment under section 147/225, and convicted Wazira and Sardara under section 353 of the Indian Penal Code also, and sentenced each of them to three months' rigorous imprisonment On appeal the Sessions Judge modified the order of the Magistrate It is not quite clear what he intended to do, but I think he intended to confirm the conviction of Wazira and Sardara under section 353 of the Indian Penal Code on account of their attack on the police and the rescue of Daulatia and to convict all six appellants under section 353 of the Indian Penal Code, instead of under sections 147/225, on account of their conduct before Daulatia was arrested On the facts found it seems to me that all six were rightly

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EMPEROR v SARDAR

convicted under section 353 of the Indian Penal Code It is contended that the order of the Sessions Judge convicting under section 353 of the Indian Penal Code those whom the Magistrate had declined to convict of that offence was illegal as it was not open to the Sessions Judge to convert an acquittal into a conviction This point was considered in the case of *Queen Empress* v *Jabanulla* (1) The High Court held that an appellate court could, under section 423 of the Code of Criminal Procedure, in an appeal from a conviction under one of several sections of the Indian Penal Code mentioned in the charge sheet, alter the finding of the lower court and find the appellant guilty of an offence of which he had been acquitted by that court This ruling is in accordance with the common practice of these provinces Accused persons are often charged with having committed several offences, and the Magistrate convicts them of one offence only On appeal the Sessions Court takes a different view and convicts the accused of one of the offences of which the Magistrate has declined to convict the accused Very little violence was used in this case I think I may properly reduce the sentences passed on the applicants to two months' rigorous imprisonment each The sentences upon Wazira and Sardara will be concurrent In other respects I dismiss this application The applicants must surrender to their bail to undergo the remaining portion of their sentences

Application dismissed

(1) (1896) I L R 23 Calc., 975

1911
October 26

Before Mr Justice Karamat Husain and Mr Justice Chamier

EMPEROR *v* RAM NARESH SINGH AND OTHERS *

Jurisdiction—Offence committed in British India—Accused committed to Sessions—Transfer of territory to native state—Accused discharged for want of jurisdiction—Revision

Certain persons were charged with committing an offence at a place in British India and were committed to the Sessions Court of Mirzapur the case being subsequently transferred to the Sessions Court of Benares Before trial, however the place where the offence had been committed became part of the newly constituted state of Benares *Held* that the Sessions Court whether of Mirzapur or Benares was not deprived of jurisdiction to dispose of the case which had been committed to it for trial inasmuch as at the time of the transfer to the state of Benares of the place where the alleged offence had been committed the accused were in British India in custody in point of law if not in fact of a court of competent jurisdiction *Emperor* v *Mahabir* (1) followed *Damodhar Gordhan* v *Deoram Kanji* (2) distinguished

THE facts of this case were as follows —

On the 17th of March, 1911, Ram Naresh Singh, Ram Niranjan Singh, Dubri Singh, Dhakelu, Munnu and Jarbandhan were committed to the Court of Session at Mirzapur by a magistrate of the first class exercising jurisdiction in that district on a charge of having committed murder at a place in pargana Bhadohi in the Mirzapur district, which was, both at the time of the alleged offence and at the date of the commitment, part of British India On the 1st of April, 1911, the state of Benares was constituted, and the village where the offence is said to have been committed became part of that state On the 5th of April, 1911, the case was transferred by the High Court from the Court of the Sessions Judge of Mirzapur to the court of the Sessions Judge of Benares The Sessions Judge of Benares ultimately came to the conclusion that he had no jurisdiction to try the case and accordingly declined to do so Against this order an appeal and also an application in revision were filed on behalf of the Local Government

The Government Advocate (Mr *A E Ryves*), for the Crown

KARAMAT HUSAIN and CHAMIER, JJ —On the 17th of March 1911, Ram Nare h Singh, Ram Niranjan Singh, Dubri

* Criminal Revision No 613 of 1911 by the Local Government from an order of G A Paterson Sessions Judge of Benares dated the 20th of June 1911

(1) (1911) I L R 33 All 578 (2) (1876) I L R 1 Bom. 367

Singh, Dhakelu, Munnu and Jarbandhan were committed to the Court of Session at Mirzapur by a magistrate of the first class exercising jurisdiction in that district on a charge of having committed murder at a place in pargana Bhadohi in the Mirzapur district, which was, both at the time of the alleged offence and at the date of the commitment, part of British India On the 1st of April, 1911, the state of Benares was constituted, and the village where the offence is said to have been committed became part of that state For reasons, which it is unnecessary to state, this Court, on the 5th of April, 1911, transferred the case from the court of the Sessions Judge, Mirzapur, to the court of the Sessions Judge of Benares The latter then referred the case to this Court with a recommendation that the order, transferring the case to Benares, should be set aside on the ground that this Court had no jurisdiction to make such an order On that this Court made an order which concludes as follows —

"We do not understand the reference made to us by the learned Sessions Judge of Benares It is for him to carry out the orders of this Court and not to question them Let the record be returned to him with instructions to try the case committed to the Court of Session at *Mirzapur and transferred by this* Court under order No. 1692 dated the 5th of April 1911 "

The Sessions Judge of Benares did not understand that order to mean that the Sessions Judge of Benares had jurisdiction to try the case He understood that the question whether he had or had no jurisdiction to try the case was to be decided by him Accordingly, on the case being called on, he took up the question of jurisdiction and decided that he had no jurisdiction to try the case He seems to have been of opinion that the only court which could try the case was some court in the state of Benares In support of that view he referred to the order passed by this Court in Criminal Revision No 149 of 1911— *King Emperor* v *Mata Prasad* That also was a reference by the Sessions Judge of Benares The accused was charged with having committed an offence at a place which formed part of the Family Domains of the Maharaja of Benares in the Benares district. At the date of the alleged offence the accused would have been properly committed to the Court of Session at Benares But on the 7th

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EMPEROR v. RAM NARESH SINGH

of February, 1911, a Government Notification was issued transferring the place in question to the district of Mirzapur, and the question arose whether the case, which had been committed to the court of the Sessions Judge of Benares, should be tried by the Sessions Judge of Benares or by the Sessions Judge of Mirzapur. This Court decided that the case should be tried by the Sessions Judge of Mirzapur, and under section 185 of the Code of Criminal Procedure directed that the case should be tried by the Sessions Judge of Mirzapur. That case appears to us to have no bearing upon the present case. The learned Sessions Judge has attempted to distinguish from the present case the case of *Emperor* v. *Mahabir* (1), which was brought to his notice. He says that in that case the question was as to the forum of appeal, whereas in the present case the question is what court of original jurisdiction has power to try the case. It seems to us that the principle on which the case of *Emperor* v. *Mahabir* was decided applies to the present case. The accused in the present case are charged with having committed an offence at a place which was in British India. They were properly committed to the Court of Session at Mirzapur and that court had jurisdiction to try them when the State of Benares was constituted. It is impossible to hold that the Sessions Court at Mirzapur was by the constitution of the State of Benares deprived of jurisdiction to dispose of criminal appeals then pending in it or cases which had been committed to it for trial. The Sessions Judge has referred also to the case of *Damodhar Gordhan* v. *Deoram Kanji* (2). It is sufficient to say that the actual decision in that case has no bearing whatever on the question which arises in the present case. The remark at the end of the judgement of their Lordships regarding the effect of a cession of territory upon cases where the jurisdiction over the subject matter and parties is territorial does not apply to the present case. At the date of the constitution of the State of Benares the accused persons were in British India, in the custody, in point of law if not in fact, of a court competent to try them. We hold that the Sessions Judge of Mirzapur had

(1) (1911) I. L. R., 33 All. 578. (2) (1876) I. L. R. 1 Bom., 367.

jurisdiction to try this case, that it was properly transferred to the Court of Session at Benares, and that the Sessions Court at Benares has jurisdiction to try the case The Government Advocate presented both an appeal against and an application for revision of the order of the Sessions Judge In our opinion no appeal lay, inasmuch as there was no order of acquittal, but we have no doubt that we have jurisdiction under section 435 to set aside the order of the Sessions Judge directing that the accused should be set at liberty One of the six accused has not been arrested We think that the Sessions Judge should proceed to try the five accused who have been arrested For the above reasons we set aside the order of the Sessions Judge of Benares, and direct him to proceed with the trial of the five persons who have been arrested The appeal is formally dismissed.

1911

EMPEROR v RAM NARESH SINGH.

Appeal dismissed—Application allowed

APPELLATE CIVIL

1911 *November 8.*

Before the Hon ble Mr H G Richards, Chief Justice, and Mr Justice Banerji.

RAGHUBIR SINGH AND OTHERS (PLAINTIFFS) v RAM CHANDAR (DEFENDANT) *

Act No III of 1907 *(Provincial Insolvency Act) section* 16—*Secured creditor —Land holder and tenant—Suit for arrears of rent—Declaration of insolvency in force at date of suit*

A land holder is not as regards an agricultural tenant a secured creditor within the meaning of section 16(5) of the Provincial Insolvency Act, 1907 Although he possibly may be in a position to distrain even whilst a declaration of insolvency is in force he cannot without the leave of the court sue for arrears of rent

THE facts of this case are as follows —

The defendant respondent was declared an insolvent on the 21st of August 1909 The plaintiff appellant brought a suit against him on the 18th of December, 1909, for arrears of rent for the years 1315, 1316, and the *Kharif* of 1317 *Fasli*. The court of first instance dismissed the suit as regards the arrears which had fallen due after he had been adjudicated an insolvent,

* Second Appeal No. 1308 of 1910 from a decree of H. M Smith, Additional Judge of Aligarh dated the 30th of August 1910 reversing a decree of Muhammad Abdul Hafiz Khan, Assistant Collector first class of Aligarh dated the 30th June, 1910.

1911

RAGHUBIR SINGH v RAM CHANDAR

i e for the *Kharif* of 1317 *Fasli*, and decreed the rest The lower appellate court dismissed the suit *in toto*, holding that no separate suit could be brought against an adjudicated insolvent

The plaintiff appealed

Babu *Durga Charan Banerji*, for the appellant —

Section 16 of Act III of 1907 does not bar suits for claims prior to the declaration of insolvency Plaintiff had received no notice of the application for insolvency In any case, plaintiff, being a landlord, could come in as a 'secured creditor' under section 16, clause (5), of the Act

Section 2, clause *(f)*, says that the term 'secured creditor' includes a landlord who has a charge on land for the rent of that land

Dr *Tej Bahadur Sapru*, for the respondent, was not called upon

RICHARDS, C J and BANERJI, J —In our opinion the decision of the court below was correct It is admitted that the defendant was declared an insolvent and that declaration was in full force and effect at the time when this suit was instituted Section 16 (2) expressly provides that, save as in that section provided, no suit shall be brought against a person who is declared an insolvent without the leave of the court It is not contended that any leave was obtained It is next urged that this is a suit for rent brought by a landlord against a tenant and that the landlord ought to be considered a secured creditor having regard to the definition in section 2*(f)* In our opinion, so far as an ordinary suit for rent is concerned, the landlord is in exactly the same position as any other creditor It may, no doubt, be that he would have a right to distrain for his rent notwithstanding the declaration of insolvency The words of section 16, sub-section (5), are "nothing in this section shall affect the power of any secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed" It is quite clear that this clause only refers to dealings with the securities of a secured creditor It does not apply to the case of a suit for rent

The appeal fails and is dismissed with costs

Appeal dismissed.

REVISIONAL CIVIL

1911
November 7

Before Mr Justice Karamat Husain and Mr Justice Chamier

GAURA BIBI AND OTHERS (PLAINTIFFS) v GHASITA (DEFENDANT) *

Civil Procedure Code (1908) *order XVII rule 3 order IX rule 4—Adjourned hearing—Suit dismissed on merits—Remedy of plaintiff—Procedure*

At an adjourned hearing of a suit in the court of a Munsif the plaintiffs were not present and their pleader intimated to the court that he had no instructions to go on with the case The suit was thereupon dismissed under order XVII rule 3 of the Code of Civil Procedure 1908 on the ground that the claim was not proved The plaintiffs then made an application for restoration under order IX, rule 4 The Munsif dismissed the application and his order was affirmed by the District Judge

Held on application in revision by the plaintiffs that no revision lay The suit having been dismissed under order XVII rule 3 of the Code on the merits the plaintiffs remedy was by way of appeal against the Munsif s decree *Lalta Prasad* v *Nand Kishore* (1) followed

THE facts of this case were as follows —

The original case was posted for hearing for the 5th of August, 1910 The defendant filed her written statement denying the claim The plaintiffs then applied for the amendment of the plaint This application was allowed and they were ordered to give a copy of the amended plaint to the defendant and the next day was fixed for the final hearing of the case On the 6th of August, 1910, one of the plaintiffs was examined and issues were framed The plaintiffs then applied for postponement of the case in order that they might obtain and produce a certificate to collect the debt in suit It was ordered that they should first prove the execution of the mortgage bond, the basis of their suit, and in case such evidence was produced, time would be given to produce the certificate But on this date the plaintiffs' witnesses were not present The plaintiffs, therefore, applied for an adjournment and the next hearing of the case was fixed for the 30th of August, 1910 On this date the defendant was present but the plaintiffs were absent Their pleader informed the Court that he had no instruction to go on with the case The suit was tried on the merits and was dismissed as the execution of the bond in suit was not proved. The Munsif remarked in his

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* Civil Revision No. 65 of 1911.

(1) (1899) I. L. R., 22 All., 66.

1911

GAURA BIBI *v* GHASITA.

judgement :—"As the plaintiffs have failed to give any evidence, I find the issue—*i e* about the execution of the bond which was the basis of the suit—in the negative"

On the 12th of September, 1910, the plaintiffs applied to have this order of dismissal set aside The Munsif dismissed the application and, on appeal, the District Judge upheld this decision

The plaintiffs then applied in revision to the High Court

Munshi *Haribans Sahai*, for the petitioners, contended that the dismissal of the suit should be held to fall under order XVII, rule 2, of the Civil Procedure Code He submitted that the petitioners not having been present and their pleader not having any instruction to go on with the case, rule 3 of order XVII of the Code could not apply He relied on *Mariannissa* v *Ramkalpa Gorain* (1) and *Chandramathi Ammal* v *C. S Narayanasami Iyer* (2)

Munshi *Ishwar Saran*, for the opposite party, contended that the Court having, as a matter of fact, decided the suit in substance as well as in form on the materials on the record, the remedy the petitioners had against this decision was to appeal against the decree It was open to the court to dismiss the suit either under rule 2 or rule 3 of order XVII Assuming that the order of dismissal under rule 3 of order XVII was wrong, it cannot be argued that the court had no jurisdiction to apply this rule to the case He cited *Sitara Begam* v *Tulshi Singh* (3), *Badam* v *Nathu Singh* (4), *Sri Raja Venkataramaya Apparau Bahadur* v *Anumukonda Rangaya Nayudu* (5), *Lachhman Singh* v *Bhajan Singh* (6) and *Lalta Prasad* v *Nand Kishore* (7)

Munshi *Haribans Sahai*, was heard in reply

KARAMAT HUSAIN and CHAMIER, JJ :—This is an application for revision of an order of the Munsif of Gorakhpur and of an appellate order of the District Judge of Gorakhpur The facts are as follows :—The applicants brought a suit against the respondent in the court of the Munsif of Gorakhpur in which

(1) (1907) I. L. R., 34 Calc., 235
(2) (1909) 19 M. L. J., 760
(3) (1901) I. L. R., 23 All., 462
(4) (1902) I. L. R., 25 All., 194
(5) (1883) I. L. R., 7 Mad 41
(6) Weekly Notes, 1893 p 84
(7) (1899) I. L. R., 22 All., 66.

summons was issued for final disposal of the suit for the 5th of August, 1910 On that date the respondent filed a written statement denying the claim The applicants applied for amendment of the plaint This was allowed, and the case was put off to the following day, when one of the applicants was examined and issues were struck The applicants then applied for the postponement of the case in order that they might obtain and produce a succession certificate The court ordered them to produce their evidence first and said that in case the mortgage deed in suit was proved, time would be granted to them to produce the certificate The applicants' witnesses were not in attendance The applicants, therefore, asked for a postponement of the case This was allowed, and the case was fixed for August the 30th, 1910 On that date the respondent was present, but the applicants were absent Their pleader, who was present in court, said that he had no instructions to go on with the case The Munsif then dismissed the suit A perusal of the Munsif's order leaves no doubt whatever that he intended to act under order XVII, rule 3 He says distinctly that he dismisses the applicants' claim because the document in suit has not been proved Twelve days later the applicants presented a petition to the court under order IX, rule 4, for restoration of the case The Munsif held that that rule did not apply, inasmuch as he had disposed of the case on the merits He dismissed the application, and his order has been confirmed on appeal by the District Judge In support of this application for revision it is contended that the Munsif ought to have proceeded under order XVII, rule 2, inasmuch as order XVII, rule 3, should not be resorted to where rule 2 is applicable We have been referred to a number of decisions of different courts on the question, the latest and most important of which are *Mariannissa* v *Ramkalpa Gorain* (1), *Ningappa Virlappa Yelloor* v *Gowdappa* (2), *Maharaja of Vizianagram* v *Lingam Krishna Bhupati* (3) and *Chandramathi Ammal* v *O. S Narayanasami Iyer* (4) These decisions show that there is some conflict of opinion as to the circumstances in which rules 2 and 3 of order XVII, should be resorted to We

(1) (1907) I. L. R., 34 Calc., 235.
(2) (1905) 7 Bom., L. R., 261.
(3) (1902) 12 M. L. J., 473
(4) (1909) 19 M. L. J., 760

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do not think it is necessary to consider or decide the question. It is perfectly clear that the Munsif proceeded under order XVII, rule 3 That being so, according to the decision of the Full Bench in *Lalta Prasad* v *Nand Kishore* (1), the applicants' remedy was by way of appeal against the decree of the Munsif We hold that this application is not maintainable It is accordingly dismissed with costs

Application dismissed

1911
November 7

APPELLATE CIVIL

Before the Hon ble Mr H G Richards Chief Justice and Mr Justice Banerji

NAND RAM (PLAINTIFF) v BHUPAL SINGH AND OTHERS (DEFENDANTS)*

Hindu law—Mitakshara—Joint Hindu family—Money borrowed by father at a high rate of interest—Legal necessity—Burden of proof

When money is borrowed by the father of a joint Hindu family on the security of the family property at a very high rate of interest it is for the lender seeking to enforce his claim to prove not only that there was necessity for borrowing the money but also that there was necessity for borrowing it at an exorbitant rate of interest *Chandradeo* v *Mata Prasad* (2) *Hurro Nath Rai Choudhri* v *Randhir Singh* (3) and *Kameswar Pershad* v *Run Bahadur Singh* (4) referred to

THIS was a suit brought by the plaintiff appellant to enforce a mortgage, dated the 8th February, 1888, for Rs 80, executed by Bahadur Singh, ancestor of the defendants Nos 1—5 The rate of interest stipulated for in the mortgage deed is Rs 2-4 0 per cent per mensem, compound interest, with half-yearly rests The plaintiff alleged that in accordance with the terms of the mortgage the total amount due to him exceeded Rs 17,000, but he claimed to recover Rs 2,500 only

The court of first instance was of opinion that the mortgage was made for the payment of Government revenue, but that it had not been established that there was any necessity for borrowing money at the high rate provided for in the

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* Second Appeal No 1351 of 1910 from a decree of Prem Behari officiating Second Additional Judge of Moradabad dated the 20th of September 1910 modifying a decree of Gauri Shankar Subordinate Judge, of Moradabad, dated the 28th of February 1910

(1) (1899) I. L. R., 22 All., 6
(2) (1909) I. L. R., 31 All., 176
(3) (1890) I. L. R., 18 Calc., 311
(4) (1880) I. L. R., 6 Calc., 843

mortgage deed That court made a decree for simple interest at the rate of 18 per cent per annum, and the total amount decreed by it was Rs 432 1-0, that is, more than five times the principal amount borrowed

The plaintiff appealed and the defendants filed objections under order XLI, rule 22, of the Code of Civil Procedure The lower appellate court came to the conclusion that no undue influence had been exercised on the mortgagor and varied the decree of the court of first instance and allowed simple interest at the rate of Rs 2 4 0 per cent per mensem, that is, Rs 27 per annum

The plaintiff appealed to the High Court

Dr *Tej Bahadur Sapru*, for the appellant

Mr *A H C Hamilton*, for the respondents

RICHARDS, C J and BANERJI, J —This appeal arises out of a suit brought by the plaintiff appellant to enforce a mortgage, dated the 8th February, 1888, for Rs 80, executed by Bahadur Singh, ancestor of the defendants Nos 1—5 The rate of interest stipulated for in the mortgage deed is Rs 2 4 0 per cent per mensem, compound interest, with half-yearly rests The plaintiff alleged that in accordance with the terms of the mortgage the total amount due to him exceeded Rs 17,000, but he claimed to recover Rs 2,500 only

The court of first instance was of opinion that the mortgage was made for the payment of Government revenue but that it had not been established that there was any necessity for borrowing money at the high rate provided for in the mortgage deed That court made a decree for simple interest at the rate of 18 per cent per annum, and the total amount decreed by it was Rs 432 1-0, that is, more than five times the principal amount borrowed

The plaintiff appealed and the defendants filed objections under order XLI, rule 22, of the Code of Civil Procedure. The lower appellate court in a somewhat sketchy judgement came to the conclusion that no undue influence had been exercised on the mortgagor and varied the decree of the court of first instance and allowed simple interest at the rate of Rs 2 4 0 per cent. per mensem, that is, Rs 27 per annum.

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This was an inconsistent judgement, because the court should either have allowed compound interest at Rs 37 per cent per annum, which was the contract rate of interest, or if it considered that it was competent to interfere with the contract of the parties and reduce the rate, it ought to have set forth reasons for interfering with the decision of the court below

The plaintiff, however, was not satisfied with the decree of the lower appellate court and preferred this appeal claiming compound interest as stipulated in the mortgage deed The defendants have preferred the connected appeal No 1364 of 1910, in which they urge that the court below ought not to have raised the rate of interest allowed by the court of first instance We are of opinion that the plaintiff's appeal must fail It has been held by a Full Bench of this Court in *Chandra deo Singh* v *Mata Prasad* (1), that where a plaintiff seeks to enforce a mortgage made by the father or manager of a joint Hindu family as against the joint family property, it lies on the plaintiff to show that the loan was contracted for the necessities of the family We are bound to follow this Full Bench ruling, and therefore it lay on the plaintiff to prove that there was necessity not only for borrowing the money but for borrowing it at the exorbitant rate mentioned in the mortgage deed. In the case of *Hurro Nath Rai Chowdhri* v *Randhir Singh* (2), their Lordships of the Privy Council held, in a case in which money had been advanced to a Hindu for the payment of Government revenue, that the plaintiff ought to have proved that there was a necessity to borrow the money at the high rate of interest agreed upon in the mortgage deed This was, no doubt, the case of a widow acting as guardian of an infant, but in view of the Full Bench ruling of this Court to which we have referred, and also of the decision of their Lordships of the Privy Council in *Kameswar Pershad* v *Run Bahadur Singh* (3), the principle which governs the case of a guardian of a minor and of a Hindu widow should be applied to the case of the father of a Hindu family In this case the court of first instance found that the property mortgaged was of such value as to make the borrowing of money

(1) (1909) I. L. R., 31 All., 176. (2) (1890) I. L. R., 18 Calc., 311.
(3) (1880) I. L. R., 6 Calc., 843.

at such a high rate of interest unnecessary It was also of opinion that it had not been established that there was any necessity for borrowing at such high rate of interest This finding was never seriously attacked, nor do we see how it could have been We must, therefore, hold that, although there was necessity for borrowing the money, there was no necessity for borrowing at the high rate contracted for in the mortgage deed, and we are of opinion that in view of the long delay which the plaintiff has made in instituting his suit, the court of first instance was justified in reducing the rate of interest claimed to simple interest at the rate of Rs 18 per cent per annum The result is that we must dismiss this appeal with costs, and we order accordingly

Appeal dismissed

Before Mr Justice Karamat Husain and Mr Justice Chamier

ABDULLA AND OTHERS (DEFENDANTS) v RAM LAL AND OTHERS (PLAINTIFFS)

1911 November 9

Hindu law—Mitakshara—Hindu widow—Gift—Consent of next reversioner not sufficient to validate gift in favour of sister's son.

Held that a gift of her deceased husband s estate made by a Hindu widow in possession thereof as such widow to her sister s son was invalid and could not be rendered operative by the consent of the next reversioner *Bajrangi Singh* v *Manokarnika Bakhsh Singh* (1) discussed

THE facts of this case were as follows —

Dudh Nath and Bhola Nath were two brothers They were separate Bhola Nath died without issue, and his widow, Musammat Phul Kunwar, came into possession of his property Dudh Nath was the next reversioner On the 27th of August, 1898, Musammat Phul Kunwar executed a deed of gift of the property in favour of her nephew, Dwarka Prasad, who sold the property to the appellants on the 9th of April, 1908 Dudh Nath joined Musammat Phul Kunwar in executing the deed of gift. Dudh Nath died in 1902 or thereabouts In 1909, the plaintiffs, who were the next reversioners at that time, brought a declaratory suit against Musammat Phul Kunwar and the heirs of Dwarka

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* Second Appeal No. 157 of 1911 from a decree of Guru *Prasad Dube*, Second Additional Judge of Gorakhpur dated the 9th of September 1910 reversing a decree of Gauri Prasad Additional Munsif of Deoria dated the 21st of August 1909

(1) (1907) I. L. R., 30 All 1.

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Prasad and the appellants (vendees) The court of first instance held that Dudh Nath and Bhola Nath had been joint The lower appellate court held that they had been separate, but that the gift by the widow was not binding on the plaintiffs, and decreed the suit The defendants appealed

Babu *Surendra Nath Sen* (with him the Hon'ble Pandit *Sundar Lal* and Pandit *Shiam Krishna Dar*), for the appellants —

It is settled law that a transfer made by a Hindu widow, with the consent of the next reversioner, is valid, although the transfer may not have been made for legal necessity, *Bajrangi Singh* v *Manokarnika Bakhsh Singh* (1) Dudh Nath alone was the next reversionary heir, his consent, therefore, validates the alienation He not only consented but actually joined in executing the deed of gift The view that the consent of the nearest reversioner would validate such an alienation is fully affirmed by the Privy Council—*vide* page 21 of the report They overruled the case of *Ramphal Rai* v *Tula Kuari* (2) and held that a Hindu widow could validly accelerate the next succession by surrender of her rights to the next reversioner and could make a valid alienation with his consent The widow alone, no doubt, represents a limited estate, but the widow and the next reversioner together represent the whole estate The case of *Bakhtawar* v *Bhagwana* (3), which is against me, proceeded to distinguish the Privy Council case, cited above, on the ground that the latter was a case of sale, whereas that in I L R, 32 All, was one of gift There seems to be, in principle, no distinction between these two forms of transfer so far as the present question is concerned Dudh Nath was the nearest reversioner, and whatever practical interest he may have had in the property, legally he had such an interest that by joining the widow in an alienation he could fully supplement her limited interest I must, however, admit that the case of *Pilu bin Appa Nalvade* v *Babaji bin Naru Mang* (4) is against my contention

(1) (1907) I L. R. 30 All., 1
(2) (1883) I. L. R., 6 All., 116
(3) (1910) I L. R., 32 All., 176
(4) (1909) I. L. R., 31 Bom., 165

Munshi *Govind Prasad* (with Babu *Satya Chandra Mukerji*), for the respondents —

The Privy Council case in I L R, 30 Allahabad is to be considered with reference to its facts In that case the remote reversioners were held to be bound by the act of relinquishment of their predecessors in title who had received valuable consideration, no general principle was meant to be laid down The consent of the reversioners makes the alienation valid only on the ground that it raises a presumption as to the existence of legal necessity for the alienation I rely on the cases, already cited, in I L R, 6 Allahabad and I L R, 34 Bombay In the case of a gift there can be no question of legal necessity, and, therefore, consent is of no avail The Privy Council case should not be taken to have meant to overrule the whole of the reasoning of the case in I L R, 6 Allahabad The case in I L R, 32 Allahabad fully meets the facts of the present case

Babu *Surendra Nath Sen* replied

CHAMIER J —Dudh Nath and his brother Bhola Nath each owned a nine pie share in a village Bhola Nath died childless about 25 years ago, leaving a widow Phul Kunwar who took possession of his share In 1898, Phul Kunwar transferred that share by deed of gift to her sister's son Dwarka Prasad. Dudh Nath joined in the deed Dwarka Prasad ten years later sold the share to the appellants for Rs 1,342 - Dudh Nath died a few years ago and was succeeded by the respondents, who were his heirs They brought this suit in 1909, praying for a declaration that the deed of gift of 1898 was not binding on them as the presumptive reversionary heirs of Bhola Nath. The Munsif dismissed the suit holding that Dudh Nath and Bhola Nath were joint in estate, consequently Phul Kunwar had no interest which she could transfer to her nephew On appeal the Additional Judge held that Dudh Nath and Bhola Nath had separate interests—a finding which must be accepted by this Court in second appeal—and, following the decision of this Court in *Bakhtawar* v *Bhagwana* (1), that the deed of gift was bi upon the ndents notwithstanding that at the of the

(1) 176,

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deed the presumptive reversionary heir of his brother had joined in the gift

The appellants rely upon the decision of their Lordships of the Privy Council in the case of *Bajrangi Singh* v *Manokarnika Bakhsh Singh* (1) as establishing the rule that a transfer of her husband's estate by a Hindu widow is binding on the person who becomes entitled to the estate on the death of the widow, if the person who is presumptive reversioner at the date of the transfer joins with the widow in making it, whatever the nature of the transfer may be The respondents rely upon the decision of this Court in *Bakhtawar* v *Bhagwana* (2), where it was held that the decision of the Privy Council did not apply at all to the case of a gift by a widow

In the case before their Lordships of the Privy Council there had been several sales of portions of her husband's estate by a Hindu widow, the alienations taken together amounting to the transfer of the whole estate Their Lordships begin by referring to previous decisions of the Board in *Collector of Masulipatam* v *Cavaly Vencata Narrainapah* (3) and *Raj Lukhee Dabea* v *Gokool Chunder Chowdhry* (4) as establishing principle that an alienation by a Hindu widow which would not otherwise be legitimate may be validated by the consent of her husband's kindred, and they observe that upon the practical application of the general principle there had been much discussion in the High Courts in India They disapprove of the view expressed by this Court in *Ramphal Rai* v *Tula Kuari* (5), that the consent of the person who was presumptive reversioner at the date of the alienation cannot make the alienation binding upon the person who turns out to be the actual reversioner at the widow's death Next they refer to three decisions of the Calcutta and Madras High Courts in which the view taken was that as it was established law that a widow could surrender her estate to the next reversioner it followed that she could alienate it with his consent without any legal necessity Lastly, their Lordships quote a decision of the

(1) (1907) I L R, 30 All 1 L R 35 I A, 1
(2) (1910) I L R 32 All 1 6
(3) (1861) 8 Moo I A, 529
(4) (1869) 13 Moo I A, 209
(5) (1883) I L R, 6 All, 116

Bombay High Court in which JENKINS, C J, while disapproving the Calcutta view that the widow's interest was a life estate, the surrender of which to the next reversioner accelerated his estate, came to the conclusion that an alienation by a widow *otherwise than for legal necessity may be validated by the* consent of the reversioners, but the consent of the reversioners must be of such kindred, the absence of whose opposition raises a presumption that the alienation is a fair and proper one After this review of the cases their Lordships say "the principle being thus admitted by the High Courts in India, the question of quantum of consent necessary only remains They [their Lordships] agree with the High Court of Calcutta that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible "

If their Lordships affirmed the correctness of the Calcutta view, we must hold that even a gift of the whole estate by a Hindu widow (the Calcutta High Court have always confined their rule to transfers of whole estates) is binding upon the actual reversioner, if made with the consent of the person who was presumptive reversioner at the date of the gift If, on the other hand, their Lordships approved of the Bombay view, we should hold that the consent of the presumptive reversioner does not validate a gift, as in the present case, of the whole estate to a relation of the widow, for such consent cannot lead to the inference that the transfer was a fair and proper one In the case of *Pilu bin Appa Nalvade* v *Babaji bin Naru Mang* (1) SCOTT, C J, and BATCHELOR, J, held that the principle according to which a widow's alienation may be validated by the consent of the presumptive reversioner is ordinarily limited to transfers for consideration and cannot be extended to gifts where there is no room for the theory of legal necessity They evidently considered that the decision of the Privy Council had not touched the previous Bombay rulings on the subject.

In *Ramkrishna Kuppuswami* v *Tripurabai* (2) SCOTT, C J and RAO, J, after referring to the decision of the Privy

(1) (1909) I L R, 34 Bom 165 (2) (1911) 13 Bom. L. R., 940.

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Council in *Bajrangi Singh* v *Manokarnika Bakhsh Singh* (1) held that the consent of the next reversioner was not always sufficient in every case to validate an alienation by the widow This Court, as already stated, has held that the decision of the Privy Council in that case does not apply to a gift by a widow

I am not satisfied that their Lordships of the Privy Council intended to accept the Calcutta view and reject the Bombay view Had that been their intention, they would, I think, have expressed themselves in different language It is to be noticed that in the case before their Lordships the presumptive reversioners, being in the fourth degree, and other reversioners in the fifth degree of relationship to the widow's husband had consented to the alienation. The appellants are described as *claiming through* two reversioners in the fifth degree (a view which it is difficult to reconcile with some other decisions) If the consent of all the reversioners in the fourth degree was sufficient, it is not clear why their Lordships referred at all to the consent given by the reversioners in the fifth degree It is to be noticed also that the Judicial Commissioners had definitely rejected the Calcutta view, yet their Lordships did not say that they were wrong in so doing They agreed with the Judicial Commissioners that the consent proved was sufficient

On the whole, I think, that there is sufficient reason for holding that their Lordships' decision was not intended to reject the Bombay view which was the view taken by the Judicial Commissioners in the case before them If the Bombay view is to prevail, it is clear that the consent given by Dudh Nath is of no value He was an old man who had really no interest in the property and no prospect of succeeding to it With or without such consent the gift to the widow's sister's son cannot by any process of reasoning be held to be a legitimate transaction I would dismiss this appeal with costs

KARAMAT HUSAIN, J —I agree

BY THE COURT —The order of the Court is that the appeal be dismissed with costs

Appeal dismissed

(1) (1907) I L R 30 All, 1

Before Mr Justice Karamat Husain and Mr Justice Chamier

1911 November 8

GANPAT RAI (DEFENDANT) *v* MUNNI LAL AND ANOTHER (PLAINTIFFS) *

Hindu law—Mitakshara—Joint Hindu family—Debt incurred by managing member of family—Presumption as to family necessity or benefit—Burden of proof

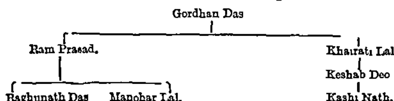
There is no presumption that a debt contracted by the manager of a Hindu firm or family is contracted for the benefit of the firm or family and the plaintiff who seeks to bind the other members of the joint family will have to prove that it was a debt contracted for their benefit or with their consent or that there was an urgent family necessity therefor *Soiru Padmanabh Rangappa* v *Narayanrao bin Vithalrao* (1) *Sunkur Pershad* v *Goury Pershad* (2) *Nagendra Chandra Dey* v *Amar Chandra Kundu* (3) and *Krishna Ramaya Naik* v *Vasudev Venkatesh Pai* (4) referred to *Sheo Pershad Singh* v *Saheb Lal* (5) distinguished.

THE facts of this case are fully stated in the judgement of the court

The Hon'ble Pandit *Moti Lal Nehru* (with whom Pandit *Mohan Lal Sandal* and Pandit *Shiam Krishna Dar*), for the appellant

The Hon'ble Pandit *Sundar Lal* (with whom Dr *Satish Chandra Banerji*), for the respondents

KARAMAT HUSAIN and CHAMIER, JJ —The following pedigree will show the relation of some of the parties to this case —



The plaintiffs, Munni Lal and Chhedi Lal, instituted this suit against Ram Prasad, Raghunath Das, Manohar Lal, Keshab Deo, Kashi Nath, Ganpat Rai and Puran Chand on the following allegations Ram Prasad, defendant No 1, was the proprietor and manager of the firm styled Gordhan Das Ram Prasad, at Agra In order to carry on the business of the said firm he borrowed from the plaintiffs Rs 16,000 by hypothecating the

* First Appeal No 58 of 1910 from a decree of J L. Johnston Additional Judge of Agra dated the 24th of November 1909

(1) (1893) I.L.R 18 Bom 520
(2) (1879) I.L.R 5 Calc 321
(3) (1903) 7 C W N., 725
(4) (189) I L.R., 21 Bom. 808
(5) (1892) I.L.R. 20 Calc., 453

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family property, known as the Putaria Mahal in the city of Agra, under a registered bond, dated the 25th of January, 1903 Out of the amount of principal and interest due on the mortgage, Rs 13,170 were paid by Babu Puran Chand, defendant No 6, on the 4th of September, 1906 The balance, amounting to Rs 6,585, has not been paid by the defendants Keshab Deo, after the execution of the mortgage bond dated the 25th of January, 1903, in order to defraud the plaintiffs and other creditors, sold a portion of the hypothecated property to Ganpat Rai by a deed, dated the 14th July, 1905, alleging himself to be the adopted son of Khairati Lal Keshab Deo and his representative in interest, Ganpat Rai, are bound to pay the balance due on the mortgage bond inasmuch as the property of the family was mortgaged for the payment of debts contracted in the ordinary course of the business of the firm and for the benefit of Keshab Deo and his representative Ganpat Rai The plaintiffs, on the above allegations, prayed for the recovery of the balance by sale of the property hypothecated The pleas put forward by Ganpat Rai were to the effect that Keshab Deo was the adopted son of Khairati Lal, that the mortgage deed, dated the 25th of January, 1903, was a fraudulent transaction, that no consideration passed for it, that the debts for payment of which the mortgage deed was executed were not contracted for any legal necessity, nor were they of such a nature as to be binding on Keshab Deo or his representative that Ram Prasad at the time of the execution of the mortgage deed was not the manager of the firm, and that he had no authority to transfer the joint family property, nor did he in that capacity execute the mortgage deed in question The court below framed the following issues —(1) Whether Ram Prasad was the manager and working agent of the firm Gordhan Das, Ram Prasad, whether he in the same capacity executed the mortgage deed, dated the 25th of January, 1903, and whether the said deed was executed for consideration (2) Whether Keshab Deo is an adopted son of Khairati Lal and how far he and his representative, Ganpat Rai, are bound by the mortgage deed in suit (3) Whether the plaintiffs are entitled to the interest claimed Is there any mistake in the calculation of the amount? (4) Whether two thirds of the house purchased by defendant No 6 are not liable for the plaintiffs'

claim (5) To what reliefs are the plaintiffs entitled? The Court found as a fact that Ram Prasad was the manager and working agent of the firm Gordhan Das Ram Prasad, that he executed the mortgage deed in his capacity of a managing member of the firm, that the deed was executed for consideration, that Keshab Deo was the adopted son of Khairati Lal, that there was no sufficient evidence of the fact that the debts for the payment of which the mortgage deed was executed were gambling debts, and that Ganpat Rai, the representative of Keshab Deo, was bound by the mortgage in suit On these findings the court below decreed the plaintiff's suit Lala Ganpat Rai, the vendee under the deed of 14th July, 1905, has appealed, and the plaintiffs have filed objections The substance of the pleas taken in the memorandum of appeal is that the mortgage deed was executed without consideration, that it was a fraudulent transaction, that Ram Prasad was not competent to borrow the money, that he was not the manager of the firm at the time of the execution of the mortgage deed, that the mortgage deed was not executed for the benefit of the firm or for legal necessity or for the benefit of Keshab Deo or with his consent, and that the share of Keshab Deo now in the possession of the appellant as a *bonâ fide* purchaser was not liable for the payment of the debt contracted by Ram Prasad The substance of the objections taken by the plaintiffs is that the adoption of Keshab Deo is not proved nor is it proved that Khairati Lal authorized his wife to adopt a son For the reasons stated by the learned Additional Judge in his judgement, we agree with him that Ram Prasad was the manager of the firm styled Gordhan Das Ram Prasad, that the mortgage deed dated the 25th of January 1903, is not a fraudulent transaction, and that it was executed for consideration The only points which remain for determination are the following —Is Keshab Deo the adopted son of Khairati Lal? Are the debts for the payment of which the family property in question was mortgaged gambling debts? Is the share of Keshab Deo, which was purchased by the appellant, Ganpat Rai, liable for the payment of the mortgage debt?

[A portion of the judgement dealing with the evidence as to the first and second points is here omitted The court found that

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Keshab Deo was the adopted son of Khairati Lal. The judgement thus continued :—]

We therefore, disagreeing with the learned Judge of the court below, hold that the debts for the payment of which the mortgage deed of 25th January, 1903, was executed by Ram Prasad were gambling debts. That being so, they cannot be regarded as the debts contracted by Ram Prasad in his capacity of a manager of the firm in the course of the ordinary business of firm, and if the statement of Munni Lal that he lent the money to Ram Prasad alone be taken into account, it becomes evident that Ram Prasad was not raising funds for the ordinary business of the firm. There is no evidence to show that there was any urgent necessity for raising that money by the mortgage of the family property, nor is there any evidence that Keshab Deo was in any way benefited by that loan or that it was raised with his consent. In these circumstances it is necessary to see what is the law applicable to the facts of the case. In *Soiru Padmanabh Rangappa* v. *Narayanrao bin Vithalrao* (1) it is laid down that there is no presumption that a loan contracted by a manager of a joint Hindu family has been contracted for family purposes. In *Sunkur Pershad* v. *Goury Pershad* (2) it is laid down :—"The condition of a Hindu family is *primâ facie* joint, and, therefore, property held by the managing member of a Hindu family is *primâ facie* joint," but as there is nothing to prevent an individual managing member from contracting debts on his own account there is no presumption that a "debt contracted by him is joint." In *Nagendra Chandra Dey* v. *Amar Chandra Kundu* (3) it was held that in order to make the brother of the manager liable it was necessary to find (1) whether the trading business was a joint family business, (2) whether the note given was for the purposes of the trading business of the family, and (3) whether the amount covered by the note was appropriated to the purposes of such trading business. In *Krishna Ramaya Naik* v. *Vasudev Venkatesh Pai* (4) it is laid down that there is no presumption that money borrowed by a manager was borrowed for family purposes. The above cases are authority for the proposition that there is no

(1) (1893) I. L. R., 18 Bom. 520.
(2) (1879) I. L. R., 5 Calc. 321.
(3) (1903) 7 C. W. N., 725.
(4) (1896) I. L. R., 21 Bom., 808 (815).

presumption that a debt contracted by the manager of a firm or family was contracted for the benefit of the firm or family, and the plaintiff who seeks to bind the other members of the joint family will have to prove that it was a debt contracted for their benefit or with their consent, or that there was an urgent family necessity therefor During the course of his argument the learned advocate for the respondents relied on *Sheo Pershad Singh* v *Saheb Lal* (1) But that case does not touch the points which we have to determine In that case the debt was incurred in the ordinary course of business, and a decree was passed in execution of which the family property in dispute in that case was sold, and the plaintiffs as members of a joint Hindu family sued for a declaration that their shares were not liable The Calcutta High Court with reference to the facts of that case came to the conclusion that the plaintiffs were not entitled to the declaration they sought As in the case before us the plaintiffs have failed to prove that there was any real necessity for the loan, or that the loan in question was taken with the consent of Keshab Deo, or that he in any way was benefited thereby, and as there is evidence that the debts for the payment of which the family property was mortgaged were gambling debts, we are of opinion that the share of Keshab Deo which was sold to Ganpat Rai is not liable for the payment of those debts The result is that we allow the appeal and set aside the decree of the court below in respect of the property which was sold by Keshab Deo to Ganpat Rai

Appeal decreed

(1) (1892) I L.R, 20 Calc 453

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November 10

Before Mr Justice Karamat Husain and Mr Justice Chamier

SHANKAR LAL AND ANOTHER (DEFENDANTS) *v* SARUP LAL AND ANOTHER (PLAINTIFFS) *

Civil Procedure Code (1908), order XLI, rule 22—Procedure—Cross objections entertainable although appeal was not so—Act No 1 of 1877 (Specific Relief Act) sections 39 and 42—Separate suits for cancellation of a document and for possession—Practice

A respondent may file cross objections and the appellate court may act upon them notwithstanding that the appeal in which such objections are filed is not maintainable

Ordinarily where a plaintiff is out of possession and he is in a position to claim a decree for possession, he should not be permitted to obtain merely a decree for the cancellation of an instrument according to which if genuine, he has no title

ONE Roshan Lal, the owner of certain property in the Saharanpur district, died in May 1907 His stepmother then applied for a succession certificate, and Shankar Lal and another thereupon produced a will in their favour said to have been executed by Roshan Lal The heirs of Roshan Lal brought a suit for cancellation of the will The suit was dismissed, but it was found that it was not proved that the will was executed by Roshan Lal. The defendants appealed against this finding, and the plaintiffs filed cross objections The lower appellate court (additional District Judge of Saharanpur) found that no appeal was maintainable and dismissed it, but, on the plaintiffs' objections, reversed the decree below and decreed the claim for cancellation of the will The defendants appeal to the High Court

Mr *Nihal Chand*, for the appellants

Babu *Durga Charan Banerji* (with him the Hon'ble Pandit *Sundar Lal*), for the respondents

KARAMAT HUSAIN and CHAMIER, JJ —Roshan Lal, the owner of certain property in the Saharanpur district, died of plague in May 1907 After his death his stepmother applied for a succession certificate, and thereupon the defendants to this suit produced a will in their favour which they alleged had been executed by Roshan Lal The plaintiff in this suit and his

* Second Appeal No 863 of 1911 from a decree of O F Gulterman Additional Judge of Saharanpur dated the 21st of March 1911 reversing a decree of Pramatha Nath Banerji Subordinate Judge of Saharanpur dated the 18th of January, 1910

brother, who is the father of one of the defendants, appear to be the heirs of Roshan Lal Mansa Debi, the stepmother, is admittedly not an heir, but she is in possession of the property The plaintiff asks for a decree declaring that the will is a forgery and void against him, and that it should be delivered up and cancelled The first court found that the will was not proved to have been executed by Roshan Lal, but it dismissed the suit on the ground that it was governed by section 42 of the Specific Relief Act, and that the claim for a declaration was not maintainable as the plaintiff was entitled to claim possession of the property In the decree of the first court dismissing the suit the finding that it was not proved that Roshan Lal had executed the will is distinctly set out The defendants, fearing apparently that this finding would prejudice them hereafter, filed an appeal The plaintiff filed an objection under order XLI, rule 22, to the effect that the suit was not one for a declaration of title under section 42 of the Specific Relief Act, but was a suit under section 39 of the same Act The Additional Judge dismissed the defendant's appeal, and on the plaintiff's objections held that the suit was one under section 39 and not under section 42 of the Specific Relief Act, and that the plaintiff was not under the necessity of claiming any relief other than the cancellation of the will He therefore allowed the cross objections and decreed the plaintiff's claim This is a second appeal by the defendants The first question for consideration is whether the lower appellate court had power to set aside the decree of the first court on the cross-objections filed by the plaintiff According to the decisions of this Court the defendants were not entitled to file an appeal against the decree of the first court, for the decree was entirely in their favour A question was raised as to whether a respondent is entitled to file cross objections where the appellant's appeal is not maintainable at all. We are of opinion that a respondent is entitled to do so in such a case as this The respondent in the lower appellate court had a right to appeal, and we think that he did not lose his right to file cross objections merely because his opponents filed an appeal which was found to be not maintainable. On the question on which the courts below have differed, namely, whether the suit is governed

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by section 39 or section 42 of the Specific Relief Act We think there can be no doubt that the suit is governed by section 39 The plaintiff nowhere seeks a declaration of his title He asked only that the will may be declared void and delivered up to be cancelled The language used in the prayer for relief leaves no doubt that the plaintiff intended to rest his claim upon section 39 That section provides that any person against whom a written instrument is void may sue to have it adjudged void and the court may in its discretion so adjudge it and order it to be delivered up and cancelled It seems to us that ordinarily where a plaintiff is out of possession and he is in a position to claim a decree for possession, he should not be permitted to obtain merely a decree for the cancellation of an instrument according to which, if genuine, he has no title to the land Ordinarily a court would, we think, exercise its discretion wisely if it declined to adjudge such an instrument void and would do well to leave the plaintiff to a suit for possession The result of allowing a suit to be maintained under section 39 and another suit for possession to be brought immediately afterwards is that the defendant is put to unnecessary expense In the present case though the Additional Judge does not say very much about it, we think we must hold that he has exercised his discretion, and, inasmuch as he has decided that the document is void and both the lower courts agree that the will has not been proved, we do not feel called upon to set aside his decree The appeal is dismissed with costs

Appeal dismissed

Before Mr Justice Karamat Husain and Mr Justice Chamier

1911 November, 13

SHAMI NATH CHAUDHRI (PLAINTIFF) v RAMJAS AND OTHERS (DEFENDANTS)*

Act No 1 of 1872 (Indian Evidence Act) section 44—Compromise decree—Suit to set aside decree on the ground that agreement has caused by undue influence—Suit maintainable—Jurisdiction

A decree obtained by consent or on a compromise can be attacked in a separate suit not only upon the ground of fraud but upon any ground which would be a sufficient reason for invalidating the agreement upon which the decree was based *The Huddersfield Banking Company Limited* v *Henry Lister and Son, Limited* (1) followed *Musammat Gulab Kuar* v *Badshah Bahadur* (2) and *Sarbesh Chandra Basu* v *Hari Dayal Singh* (3) referred to

THIS was a suit to set aside a decree based on a compromise on the ground that the compromise was obtained by the exercise of undue influence The plaintiff brought a suit for partition of joint family property The suit was compromised and a decree was passed in terms of the compromise The plaintiff then brought the present suit to set aside the consent decree on the ground that undue influence was exercised on him

The defendants pleaded (*inter alia*) that a suit to set aside a consent decree on the ground of undue influence was not maintainable The Subordinate Judge gave effect to that plea and dismissed the suit The plaintiff appealed

Pandit *Rama Kant Malaviya* (with whom Dr *Tej Bahadur Sapru* and the Hon'ble Pandit *Madan Mohan Malaviya*), for the appellant —

The consent decree being based on a compromise which was obtained by undue influence, the suit was maintainable He relied on —*Ashutosh* v *Tara Prasanna* (4), *Musammat Gulab Kuar* v *Badshah Bahadur* (2), *Sarbesh Chandra* v *Hari Dayal Singh* (3), *Huddersfield Banking Company* v *Henry Lister* (1)

Babu *Jogindro Nath Chaudhri* (with whom Munshi *Govind Prasad* and Munshi *Purushottam Das Tandan*), for the respondent —

A decree can be set aside only on the ground of fraud In other cases the party aggrieved must proceed by way of a motion

* First Appeal No 150 of 1910 from a decree of Guru Prasad Dube, Additional Subordinate Judge of Gorakhpur dated the 16th of February 1910

(1) (1895) L R 2 Ch 273 (3) (1910) 14 C W N, 451.
(2) (1909) 13 C W N 1197 (4) (1884) I L R 10 Calc., 612

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for review of judgement Section 44 of the Evidence Act lays down the law to the same purport The case in 14 C W N is distinguishable, inasmuch as the administrator having granted a lease in excess of his powers had acted unlawfully

Pandit *Ram Kaant Malaviya* was not heard in reply

KARAMAT HUSAIN and CHAMIER, JJ —This appeal arises out of a suit brought by the appellant to set aside a decree for partition of a joint family property which was passed upon a compromise between the parties The ground of suit is that the consent of the appellant to the compromise was obtained by undue influence exerted on him by the defendant respondent, *Ramjas Chaudhri* The *suit has been dismissed by the court* below on the ground that no such suit is maintainable The Subordinate Judge was of opinion that a decree could not be set aside by suit except on the ground of fraud or collusion In the course of his judgement he refers to section 44 of the Evidence Act But that section does not purport to enumerate the grounds on which a decree can be attacked by a separate suit There are cases no doubt which suggest that where a decree is attacked by a party on any ground other than that of fraud, he should proceed by way of motion or application for review of judgement But all the recent authorities are to the effect that whether or not a party may proceed by way of motion or application for review of judgement he may proceed by suit In the case of *The Huddersfield Banking Company, Limited* v *Henry Lister and Son, Limited* (1) a consent order had been made for the sale of some power looms The Banking Company afterwards ascertained that the power looms had been affixed to certain mills so as to become part of the property comprised in a mortgage security At the time of the consent order it was supposed that the machinery was not affixed to the mills and therefore was not part of the security The Company brought an action to have the order set aside The action was resisted on the ground that the arrangement having merged in an order of the court could not be set aside VAUGHAN WILLIAMS, J, said —"The real truth of the matter is that order is a mere creature of the agreement, and to say that the court can set aside the agreement, and it was

(1) (1895) L. R., 2 Ch., 273

1911

SHAMI NATH CHAUDHRI v RAMJAS

not disputed that this could be done if a common mistake were proved, but that it cannot set aside an order which is the creature of that agreement seems to me to be giving the branch an existence which is independent of the tree Under the circumstances I have come to the conclusion that I can set aside the order and give effect to what are the true rights of the parties" His views were affirmed by the Court of Appeal LINDLEY, L J, said —"I have not the slightest doubt that a consent order can be impeached not only on the ground of fraud but on any ground which invalidates the agreement which it expresses in a more formal way than usual To my mind the only question is whether the agreement on which the consent order was based can be invalidated or not Of course if that agreement cannot be invalidated, the consent order is good If it can be, the consent order is bad" LOPEZ and KAY, L JJ, expressed themselves to the same effect The decision in that case was followed in *Musammat Gulab Kuar* v *Badshah Bahadur* (1) and in *Sarbesh Chandra Basu* v *Hari Dayal Singh* (2) The judgement of the court in the last mentioned case contains an exhaustive review of the authorities both as to the grounds on which a decree obtained by consent or upon a compromise can be attacked and as to the procedure to be adopted in such cases In our opinion the decision of the court below is wrong We allow the appeal, set aside the decree of the Subordinate Judge, and remand the suit in order that it may be restored to the file of pending cases and disposed of according to law

Appeal allowed—Cause remanded

(1) (1909) 13 C W N 1197 (2) (1910) 14 C W N., 451

REVISIONAL CRIMINAL

1911
November 16

Before Mr Justice Tudball

EMPEROR *v* BEHARI LAL AND ANOTHER *

Act No XVII of 1878 (Northern India Ferries Act) section 22—Ferry—Illegal toll taken by servants of lessee—Lessee himself not responsible

Held that the lessees of a ferry could not be held responsible under section 22 of the Northern India Ferries Act 1878 for the taking of unauthorized tolls by their servants when they were not present and took no part in the extortion *Queen Empress* v *Tyab Ali* (1) distinguished

BEHARI LAL and Bashir-ud din, lessees of a ferry, employed certain persons to attend to the ferry and to collect tolls These servants in contravention of the law extorted unauthorized and excessive tolls from certain passengers, thereby committing an offence under section 22 of the Northern India Ferries Act, 1878 For this the lessees, who apparently were not present and took no part in the extortion, were prosecuted, convicted and fined They applied to the Sessions Judge of Farrukhabad in revision, and the Sessions Judge referred the case to the High Court under section 438 of the Code of Criminal Procedure recommending that the convictions and sentences should be set aside

The applicants were not represented

The Government Advocate (Mr *A E Ryves*), for the Crown

TUDBALL, J —This is a reference by the Sessions Judge of Farrukhabad The facts of the case are as follows —The applicants for revision in the court below, namely, Behari Lal and Bashir ud din are the lessees of Singhi Rampur Ferry As such lessees, they employed certain persons to attend to the ferry and collect the tolls These servants in contravention of the law extorted unauthorized and excessive tolls from certain passengers, thereby committing an offence under section 22 of the Ferries Act The lessees, who apparently were not present and took no part in the extortion, have been prosecuted for this offence and have been convicted and fined apparently on the ground that whatever the servants have done in the course of their employment, that act is the act of the masters The learned Government Advocate has called my attention to a ruling in

* Criminal Reference No 598 of 1911.

(1) (1900) I L R, 24 Bom., 423

Queen-Empress v *Tyab Ali* (1) That is a case under the Arms Act The accused therein was a licensed vendor of arms and ammunitions and he employed a certain man as a salesman The latter sold certain military ammunition to certain persons without previously ascertaining that such persons were legally authorized to possess the same It was pointed out in the judgement of that case that the question for decision was whether the accused had or had not "*delivered*" the stores as section 22 of the Indian Arms Act, 1878, makes penal a "*delivery*" of military stores, *et cetera* The learned Judges who decided the case remarked as follows —"We fail to see how it can be contended that under these circumstances a delivery of goods by the man in charge would not be a delivery by the owner of the shop It is not a question of intention, *mens rea*, or of knowledge, it is the delivery which the Act makes penal, and the delivery by the manager is clearly in this case a delivery by the licensee" The rule laid down in *Attorney General* v *Siddon* runs as follows —"Whatever a servant does in the course of his employment with which he is entrusted and as a part of it is the master s act" The offence in the present case is a very different one It consists of extortion of unauthorized tolls from passengers The servants in doing this act did something which was outside the scope of their employment In this very offence there is decidedly a *mens rea*, a criminal intent If it were an act done by the servants within the scope of their employment, then the conviction of the master would in the present case be a good one But in my opinion the principle laid down in *Attorney General* v *Siddon* does not apply to the present offence The conviction of the lessees is bad in law I accept the reference and set aside the conviction and sentence The fine, if paid, must be refunded

Conviction set aside

(1) (1900) I L R 24 Bom 43?

1911
November 16

REVISIONAL CIVIL

Before Mr Justice Tudball

HURAN BIBI AND ANOTHER (APPLICANTS) *v* HINGAN BIBI (OPPOSITE PARTY) *

Act No VII of 1889 (Succession Certificate Act) sections 19 26—Munsif invested with functions of District Court—Appeal—Jurisdiction

Held that an appeal from an order of a Munsif invested under section 26 of the Succession Certificate Act 1889 with the function of a District Court lies to the District Judge and cannot be transferred for disposal to any other Court such as the Subordinate Judge or Judge of the Small Cause Court, not empowered under section 56

THE facts of this case were as follows

One Musammat Hingan Bibi applied under the Succession Certificate Act for a certificate enabling her to recover certain debts due to her deceased husband She was opposed by two persons, who are sisters of the deceased The application was made to the Munsif, who was invested, under section 26 of the Succession Certificate Act, with the functions of a District Court The Munsif granted a certificate to the applicant The non applicants appealed to the District Judge, who transferred the appeal to the Court of Small Causes That court dismissed the appeal The non applicants thereupon applied to the High Court in revision, mainly upon the ground that the Court of Small Causes had no jurisdiction to hear the appeal

Munshi *Damodar Das*, for the applicants

Babu *Durga Charan Banerji*, for the opposite party

TUDBALL, J —This is an application in revision which has been made under the following circumstances One Musammat Hingan Bibi applied under the Succession Certificate Act for a certificate enabling her to recover certain debts due to her deceased husband She was opposed by two persons, who are sisters of the deceased The application was made in the court of the Munsif, which is a court empowered by the Local Government under section 26, clause (1) of Act VII of 1889, to deal with such applications The Munsif after some proceedings decided in favour of the applicant for the certificate. The two sisters who had objected, preferred an appeal to the District Court The District Judge transferred the appeal for hearing and decision

* Civil Revision No 70 of 1911

to the Court of the Judge of Small Causes at Cawnpore That court has dismissed the appeal The applicants have come here in revision, and it is urged that the Judge of the Court of Small Causes had no jurisdiction to hear the appeal, which could only be heard and decided by the District Judge Of this I think there can be no doubt The Act in itself gives power to two courts, namely, the District Court and the High Court to take action in such matters But in section 26 it gives the Local Government power by notification to invest any court inferior to a district court with the functions of a district court under the Act In those cases, however, provision has been made for an appeal from an order of the inferior court—*vide* sub section (1) of section 19—to the District Court The Local Government by notification invested the Munsif with powers under this Act But neither the Subordinate Judge nor the Judge of the Court of Small Causes has been invested with powers under this Act It is quite clear, therefore, that an appeal from an order of the Munsif would lie only to the District Court, and that none of the other courts subordinate to the District Court have power to hear appeals in such cases They have no jurisdiction at all under the Act It is a special Act and the appeal lies only to the District Court and cannot possibly be heard by any such inferior courts I therefore grant the application and set aside the order of the lower court I direct that the appeal be heard and tried by the District Judge himself Costs of this application will abide the result

Application allowed

1911
November 21

APPELLATE CIVIL

Before Mr Justice Banerji and Mr Justice Tudball

JAGARNATH OJHA (PLAINTIFF) v RAM PHAL AND OTHERS (DEFENDANTS)

Civil Procedure Code (1908) order XXI rule 35—Suit for recovery of joint possession—Form of decree—Practice

Held that a plaintiff who is entitled to possession jointly with other persons can be granted a decree for joint possession whether the plaintiff was originally in joint possession and was subsequently dispossessed or whether he had never been in possession *Phani Singh* v *Nawab Singh* (1) dissented from. *Bhairon Rai* v *Saran Rai* (2) *Rahman Chaudhri* v *Salamat Chaudhri* (3) *Watson & Co* v *Ram Chand Dutt* (4) and *Bhola Nath* v *Bushin* (5) referred to

THE facts of this case are briefly as follows —

The plaintiff appellant brought a suit for joint possession of certain zamindari property, and for damages The court of first instance gave him a declaratory decree in respect of his share The lower appellate court affirmed this decree, holding that plaintiff had failed to prove that he was ever in physical possession of the lands jointly with his co sharers The plaintiff appealed

The case coming on before a single Judge was referred to a Division Bench by CHAMIER J, under the following order —

This was a suit by the appellant for joint possession of land with the respondents The land belonged to one Lachmi Ojha, on whose death it passed to his widow On the widow's death the property devolved upon the appellant, the respondents and others The respondents resisted the suit on the ground that the widow had transferred it to them for lawful necessity They also relied upon a compromise arrived at in a suit It has been found, and it is now admitted, that the compromise is not binding upon the appellant and that the transfers by the widow were not supported by necessity The courts below have given the appellant a declaration of his right in the property and have declined to give him a decree for joint possession. The only point taken in second appeal is that the appellant should have been given a decree for joint possession with the respondents

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Second Appeal No 1000 of 1910 from a decree of Sri Lal District Judge of Ghazipur dated the 27th of June 1910 confirming a decree of Ganga Nath officiating Munsif of Ballia, dated the 24th of February 1910

(1) (1907) I L R., 29 All 161
(2) (1904) I L R 26 All 688
(3) Weekly Notes 1901 p 49
(4) (1890) I L R 18 Calc 10
(5) Weekly Notes 1891 p 12

It was contended by counsel for the appellant that although a decree could not be made for joint possession before the passing of the new Civil Procedure Code, V of 1908, order XXI, rule 35, of the first schedule to that Code had made the passing of such a decree possible, and that in cases like this a decree should be made for joint possession The first part of this argument is plainly untenable The courts have always recognized a right to joint possession and have passed decrees for joint possession in certain cases See for example the case of *Bhairon Rai* v *Saran Rai* (1), where the plaintiff had been ousted from joint possession by the defendant, and the court restored the plaintiff to possession by giving him a decree for joint possession In England it has always been recognized that ejectment or its modern equivalent may be maintained by one co owner against another where there has been an actual ouster (see the cases cited in Carr on Collective Ownership, Chapter VII) TUDBALL, J , in *Sheo Pher Singh* v *Bhola Singh* (2), held that order XXI, rule 35, has made no change in the law but has merely shown how a decree for joint possession may be executed I entirely agree

If a decree can be passed to put a plaintiff back into joint possession, there is no reason why it should be considered impossible to pass a decree for joint possession in the case of a plaintiff who has never been in possession Whether such a decree ought in any particular case to be passed is another question—see the remarks of AIKMAN, J , in *Ram Charan Rai* v *Kauleshar Rai* (3) Instances of cases in which this Court has held that a decree for joint possession should not be passed will be found in *Phani Singh* v *Nawab Singh* (4) The actual decision in that case was that a decree for joint possession should not be passed in favour of one co sharer against another, where on the death of the tenant of the land the defendant, who was one of the co sharers "quietly appropriated the land " and applied for mutation of names in his favour alone One of the reasons given for the decision was that it was only by partition that a co sharer could obtain physical possession of an area equivalent to his fractional share if he was not already in possession, and a Civil Court

(1) (1904) I L R., 26 All 588
(2) S A No. 1229 of 1910
(3) (1904) I L R. 27 All., 153
(4) (1905) I. L. R., 28 All., 161

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JAGARNATH OJHA v RAM PHAL.

could not make a partition of a mahal It seems to me that this is not a reason for refusing to give a decree for *joint* possession, but *if it is a sufficient reason for refusing a decree for joint possession* where the plaintiff has never been in possession, it is also a sufficient reason for refusing such a decree where he has been in possession

Counsel for the appellant has referred me to the recent decision of BANERJI, J, in *Tund Man* v *Chedda* (1) In that case two persons, Chatur Das and Jiwan Das, had leased a shop to the defendants *The plaintiffs acquired the rights of Chatur Das* and the defendants acquired the rights of Jiwan Das The defendants declined to give the plaintiffs their share of the rent and denied their title BANERJI, J, held that the plaintiffs were entitled to a decree for joint possession, saying that it was manifest from the provisions of the present Code of Civil Procedure that a decree for joint possession could be granted. He might, I think, *have rested his decision on the ground that there had been an* actual ouster of the plaintiffs by the defendants *As I have al*ready said, I do not think that the present Code of Civil Procedure has altered the law as regards the competency of courts to give a decree for joint possession *The judgement of their Lord*ships of the Privy Council in *Watson & Co* v *Ram Chand Dutt* (2), shows that a decree for joint possession *can* be given, and that the question whether one co owner is entitled to a decree for joint possession with another co owner depends on the circumstances The judgement of their Lordships shows that it is important to ascertain whether what the defendant is doing with the *land is done in denial of the plaintiff's title* In the present case the defendants respondents have all along denied the appellant's title and have kept him out of possession, saying that they alone are entitled.

But for the decision of this Court in *Phani Singh* v *Nawab Singh* and other like cases, I should have been disposed to give the appellant a decree for joint possession In doing so I should have the support of the decision of the Calcutta High Court in *Surendra Narain* v *Hari Mohan* (3), and of BANERJI, J, in

(1) S. A No. 918 of 1910 (2) (1890) I. L. R., 18 Calc., 10
(3) (1906) I L. R., 33 Calc., 1201

Fund Man v *Chedda* It has been the practice in Oudh for years to pass decrees for joint possession in such cases as this In the circumstances the proper course seems to be to refer this appeal to a Bench of two Judges I refer it accordingly

On this appeal

Babu *Surendra Nath Sen*, for the appellant —

There has been some difference in the past as to a decree for joint possession I therefore pray for a decree under order XXI, rule 35 I rely on *Watson & Co* v *Ram Chand Dutt* (1) and *Bhola Nath* v *M Buskin* (2)

Mr *Ahmad Kareem*, for the respondents —

The law is the same as it was of old I submit that no change has been made, *Phani Singh* v *Nawab Singh and others* (3) There is a distinction between cases in which no physical possession has been obtained and cases in which there has been ouster from such possession. A decree may be granted in the latter case, but not in the former Reference was also made to *Bhairon Rai* v *Saran Rai* (4) and *Jagannath Singh* v *Jainath Singh* (5)

Babu *Surendra Nath Sen* was not heard in reply

BANERJI and TUDBALL, JJ —The only question in this appeal is whether a plaintiff, who had never been in possession but was entitled to possession jointly with other persons, could be granted a decree for joint possession The facts of the case are fully set forth in the order of our brother CHAMIER, by which he referred this case to a Bench of two Judges They are briefly these —The property in suit, which is a share of zamindari, originally belonged to one Lachmi Ojha It passed on his death to his widow, and on the widow's death to the plaintiff, to the respondents, and to others As the plaintiff did not obtain possession of the property, he brought the suit out of which this appeal has arisen for possession jointly with the defendants He also claimed damages, but that part of the claim has not been pressed in this Court Other reliefs were asked for with which we are not concerned in this appeal The court of first instance decreed a part of the claim, but refused to grant a decree for joint possession This decree was affirmed by the lower appellate court The

(1) (1890) I L R 18 Calc 10
(2) Weekly Notes 1894 p 127
(3) (1905) I L R., 28 All 161
(4) (1904) I L R 26 All 588
(5) (1904) I L R 27 All., 88

1921

KEDAR NATH KASONDHAN v. NAIPAL SINGH

involved in the present case come within the definition of occupancy rights, and, as such, they are not transferable."

The plaintiffs appealed.

Babu *Surendra Nath Sen*, for the appellant :—

Mándadári tenure is a form of customary tenure prevailing in the Gorakhpur district. Vide *District Gazetteer*, pages 131, 132, *Settlement Report* of Gorakhpur, paragraph 507. It is equivalent to an occupancy tenancy with a right of transfer. It may be said to amount to a fixed rate holding, only Gorakhpur is not a permanently settled district. This is a customary tenure, not created by Statute, and is independent of it. Defendants stand in *the shoes of the original mortgagors. They are estopped* from contesting our title. If the mortgage was invalid, it cannot be challenged by those who were parties to it. They were not aware that a *mándadári* tenure was not transferable according to law.

The *District Gazetteer* says that this from of tenure has been recognized repeatedly by Government. Reference was made to *Bagirath Chingi* v. *Sheikh Hafiz ud-din* (1).

Munshi *Govind Prasad*, for the respondents, was not called upon.

BANERJI and TUDBALL, JJ. :—This appeal arises out of a suit brought by the plaintiffs appellants to enforce a mortgage of the 27th of December 1891, executed by the first two defendants. Defendants Nos. 4 and 5 are puisne mortgagees of the property mortgaged, and defendants Nos. 6 and 7 are the sons of defendant No. 5. The property mortgaged, which the plaintiffs seek to sell, is what is known in the Gorakhpur district as a *mándadári* tenure. The courts below have held that such a tenure is not saleable and otherwise transferable, and that a suit for the sale of such a tenure is not maintainable. It is admitted that if the plaintiffs cannot obtain a decree for sale, they are not entitled to a decree for money only as more than six years had elapsed from the date on which the mortgage money became due before the institution of the suit. The only question which we have to consider is whether a *mándadári* tenure is transferable and a decree can be made for the sale of

(1) (1900) 4 C. W. N., 679.

such a tenure It is not contended on behalf of the plaintiffs that the mortgagors had any proprietary interest in the mortgaged property There is no evidence to show how *mándadári* tenures originated, and the learned vakil for the appellants does not contend that there is evidence on the record to show that a *mándadári* tenure is transferable It is admitted that the only right, which the holder of such a tenure has, is the right to occupy it as an occupancy tenant If the land in question is an occupancy holding, it is not transferable and is not liable to sale in execution of a decree Section 9 of Act XII of 1881, which was in force at the time when the mortgage in question was executed, clearly provides that an occupancy holding is not transferable in execution of a decree If it is not transferable in execution of a decree, a court cannot make a decree ordering the sale of such property The nature and incidents of a *mándadári* tenure were considered by this Court in an unreported case referred to in judgement of the court below, namely, case No 2163 of 1886, decided by STRAIGHT and BRODHURST, JJ Those learned Judges held that a *mándadári* tenure was nothing more than an occupancy holding, and was not therefore transferable We see no reason to come to a different conclusion The courts below were, therefore, right in refusing to make a decree for sale

The only other point urged before us was that the defendants were estopped from raising the plea that the property mortgaged by the persons from whom they derived title was not capable of being mortgaged We are unable to accede to this contention, inasmuch as both parties must be deemed to have known the law, and if the plaintiffs took a mortgage of the property which was not transferable under the law with the knowledge that it was unlawful for the mortgaors to make such a mortgage, they cannot be allowed to raise the plea of estoppel The appeal fails and is dismissed with costs

Appeal dismissed.

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Kedar Nath Kasondhan v. Naipal Singh

involved in the present case come within the definition of occupancy rights, and, as such, they are not transferable"

The plaintiffs appealed

Babu *Surendra Nath Sen*, for the appellant —

Mândadâri tenure is a form of customary tenure prevailing in the Gorakhpur district Vide *District Gazetteer*, pages 131 132, *Settlement Report* of Gorakhpur, *paragraph 507 It is* equivalent to an occupancy tenancy with a right of transfer It may be said to amount to a fixed rate holding, only Gorakhpur is not a permanently settled district This is a customary tenure, not created by Statute, and is independent of it Defendants stand in the shoes of the original mortgagors They are estopped from contesting our title If the mortgage was invalid, it cannot be challenged by those who were parties to it They were not aware that a *mândadâri* tenure was not transferable according to law

The *District Gazetteer* says that this from of tenure has been recognized repeatedly by Government Reference was made to *Bagirath Chingi* v *Sheikh Hafiz-ud-din* (1)

Munshi *Govind Prasad*, for the respondents, was not called upon

BANERJI and TUDBALL JJ —This appeal arises out of a *suit brought by the plaintiffs appellants to enforce a mortgage* of the 27th of December 1891, executed by the first *two* defendants Defendants Nos 4 and 5 are puisne mortgagees of the property mortgaged, and defendants Nos 6 and 7 are the sons of defendant No 5 The property mortgaged, which the plaintiffs seek to sell, is what is known in the Gorakhpur district as a *mândadâri* tenure The courts below have held that such a tenure is not saleable and otherwise transferable, and that a suit for the sale of such a tenure is not maintainable It is admitted that if the plaintiffs cannot obtain a decree for sale, they are not entitled to a decree for money only as more than six years had elapsed from the date on which the mortgage money became due before the institution of the suit The only question which we have to consider is whether a *mândadâri* tenure is transferable and a decree can be made for the sale of

(1) (1900) 4 C W N., 679

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The only other point urged before us was that the defendants were estopped from raising the plea that the property mortgaged by the persons from whom they derived title was not capable of being mortgaged We are unable to accede to this contention, inasmuch as both parties must be deemed to have known the law, and if the plaintiffs took a mortgage of the property which was not transferable under the law with the knowledge that it was unlawful for the mortgaors to make such a mortgage, they cannot be allowed to raise the plea of estoppel The appeal fails and is dismissed with costs

Appeal dismissed.

1911
November, 18

APPELLATE CIVIL

Before the Hon'ble Mr H G Richards Chief Justice and Mr Justice Banerji

RAM SARUP (PLAINTIFF) v JASODHA KUNWAR AND OTHERS (DEFENDANTS) *

Act No I of 1872 (Indian Evidence Act) section 91—Suit on promissory note—Note inadmissible in evidence—Plaintiff held entitled to fall back on original cause of action

If a creditor has a cause of action for the recovery of money for which his debtor has executed a promissory note separate from and independent of the note he can recover upon such cause in case the note for any reason cannot be put in evidence Nor is the creditor necessarily debarred from suing on the original cause of action by the fact that it arose out of the same transaction in the course of which the promissory note was executed. *Parsolam Narain* v *Taley Singh* (1) overruled *Sheikh Akbar* v *Sheikh Khan* (2) *Krishnaji* v *Rajmal* (3) *Virbhadrapa* v *Bhimaji* (4) *Banarsi Prasad* v *Fazal Ahmad* (5) and *Sri Nath Das* v *Angad Singh* (6) referred to

THE facts of this case are as follows —

The plaintiff, Ram Sarup, had money dealings with one Bhup Singh deceased, the ancestor of the defendants Bhup Singh purchased some cloth and borrowed some money from the plaintiff on different occasions The loan was entered in the plaintiff's *bahi khata*, but a note of hand was also executed by Bhup Singh in favour of the plaintiff for the amount due from him. The note of hand was in the form of a letter addressed by Bhup Singh to the plaintiff and contained a request for the loan undertaking to repay the same with interest The plaintiff brought this suit against the heirs of Bhup Singh The defendants denied the loan and further pleaded that the promissory note being a paper the stamp on which was not properly cancelled, was not admissible in evidence, and consequently the debt could not be proved otherwise The court of first instance held that the note was not admissible in evidence, but that the debt could be proved otherwise and decreed the suit on the finding that money was borrowed by Bhup Singh The lower appellate court held that the suit could not be maintained

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* Second Appeal No 139 of 1911 from a decree of Pitambar Joshi Second Additional Judge of Moradabad dated the 22nd of November 1910 modifying a decree of Gauri Shankar Munsif of Harloi dated the 22nd of December 1909

(1) (1903) I L R., 25 All., 178
(2) (1881) I. L. R., 8 Calc., 2/6
(3) (1899) I. L. R., 24 Bom., 360
(4) (1901) I. L. R., 28 Bom., 432.
(5) (1904) I. L. R., 23 All., 273
(6) (1910) 7 A. L. J 459

independently of the promissory note, and dismissed the claim so far as it was covered by the note. The plaintiff appealed.

Munshi *Gokul Prasad*, for the appellant:—

The *rugqa* has been cancelled in the proper manner and is, therefore, admissible in evidence. It was not strictly a promissory note, and did not require to be stamped. Even if it could not be produced in court, the entry of the loan in the *bahi khata* would be sufficient evidence to prove the debt. The debt could be proved although the promissory note could not be admitted in evidence. He cited *Dhondbhat Narharbhat* v. *Atmaram Moreshvar* (1), *Queen-Empress* v. *Somasundaram Chetti* (2), *Bharata Pisharodi* v. *Vasudevan Nambudri* (3) *Hira Lal* v. *Data Din* (4), *Siraj Husain* v. *Bulaki Ram* (5), *Banarsi Prasad* v. *Fazal Ahmad* (6), *Sheikh Akbar* v. *Sheikh Khan* (7), *Pramatha Nath Sindal* v. *Dwarka Nath Dey* (8), *Moti Lal Siha* v. *Monmohan Gossami* (9), *Sri Nath Dis* v. *Angad Singh* (10) and *Radhakant Shaha* v. *Abboychurn Mitter* (11) to prove that he could produce evidence *aliunde* concerning the original consideration. The stamp cannot be said to be cancelled effectively, *Virbhadrapa bin Adrashapa Javli* v. *Bhimaji Balaji Saraff* (12).

Mr. *M. L. Agarwala*, for the respondent:—

The rulings cited are under Act I of 1879. There was no definition of a promissory note in that Act. In Act II of 1899, the Legislature has deliberately departed from the definition in the Negotiable Instruments Act XXVI of 1881. A comparison of the two sections will show that the definition in section 2, clause (22) of Act II of 1899, is much wider. The two Acts were enacted for entirely different purposes. In the definition in Act II of 1899, the Legislature purposely incorporated the ruling in *Channamma* v. *Ayyanna* (13). Formerly the Stamp Law used to be evaded. The words of section 2, clause (22), fully cover the present case. It is not necessary that there

(1) (1889) I. L. R., 13 Bom., 669
(2) (1899) I. L. R., 23 Mad., 165
(3) (1903) I. L. R., 27 Mad. 1.
(4) (1881) I. L. R., 4 All., 135
(5) (1908) 5 A. L. J., 162.
(6) (1905) I. L. R. 28 All., 299
(7) (1881) I. L. R., 7 Calc. 256
(8) (1895) I. L. R., 23 Calc. 851.
(9) (1900) 5 C. W. N., 56.
(10) (1910) 7 A. L. J., 459
(11) (1882) I. L. R., 8 Calc. 721.
(12) (1904) I. L. R., 28 Bom., 432
(13) (1892) I. L. R., 16 Mad., 283

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should be an actual receipt of money side by side with the promise to pay Plaintiff is not entitled to fall back on the entry in the *bahi khata* There were two entirely separate transactions—a loan and a security Section 91 of the Evidence Act bars the production of other evidence to prove the debt I rely on the judgement of GARTH, C J, in *Sheikh Akbar* v *Sheikh Khan* (1) and on *Pothi Reddi* v *Velayudaswan* (2)

Munshi *Gokul Prasad* was not heard in reply

RICHARDS, C J and BANERJI, J – This appeal arises out of a suit in which the plaintiff sought to recover certain money A portion of the money was due upon accounts pure and simple for goods sold Another portion of it the plaintiff claimed as having been advanced by him to the defendant and for which a certain document, alleged to be a promissory note, was passed The claim is then made for Rs 35-11 6 the price of cloth, Rs 400 principal and Rs 140 0 0 interest, that is, Rs 540 0 0, in respect of a cash debt, in all Rs 576 1 6, due under account books together with the costs of the suit and future interest It will thus be seen that the plaintiff bases his claim upon his account books, and it is a claim for money lent When the document to which we have referred was produced, it appears that the stamp was cancelled by means of two lines drawn crosswise upon it

The court of first instance decreed the plaintiff's claim, but holding that the stamp was not effectively cancelled, allowed other evidence, including the account books, to be given as evidence of the loan The document, which it held to amount to a promissory note, was excluded from evidence

The defendants appealed, and the lower appellate court, adopting the view of the court of first instance that the document was a promissory note and that the stamp was not effectively cancelled, refused to allow the plaintiff's claim, except for the price of the cloth and reduced the decree of the court of first instance accordingly

The plaintiff comes here in second appeal As to whether or not the stamp was effectually cancelled, we offer no opinion

(1) (1881) I. L. R., 7 Calc., 256 (2) (1886) I L R, 10 Mad., 94

The appellant has not raised the question specifically in his memorandum of appeal

The next point which was discussed was whether the document in question was a promissory note, within the meaning of the Stamp Act of 1899 On the face of it, it is a request for the loan of money with a promise to repay the loan with interest In the view that we take of the case, it does not become necessary to decide whether or not the document is a promissory note within the meaning of the Act We shall, therefore, assume for the purposes of our decision, first, that the document in question amounted to a promissory note, secondly, that the stamp on it, although sufficient, was not effectually cancelled, and, thirdly, that the taking of the loan and the giving of the note were simultaneous transactions The appellant contends that even on all these assumptions, he is (provided he can prove that the money was lent without the help of the note), entitled to succeed in his claim not only for the price of the cloth but also for the money, claiming it as he does, as money lent The evidence that the money was in fact lent is overwhelming and is not disputed in the present appeal We, therefore, have only to decide whether on the assumptions that we have made the plaintiff must fail notwithstanding that the money was in truth and in fact duly lent

The defendants strongly rely on the case of *Sheikh Akbar* v *Sheikh Khan* (1) The learned counsel for the defendants admits that in ordinary cases where, for instance, a plaintiff took a promissory note for the price of goods sold and delivered, if he failed for any reason on his note, he would be entitled to fall back upon the original consideration, namely the price of goods so delivered, provided that he was able to prove the delivery of the goods, and that such a claim was open to him upon the pleadings In like manner, of course, he concedes that if the money was lent and subsequently a note was given for the amount, the plaintiff failing on the note would be entitled to fall back upon a claim for money lent He, however, contends that where the lending of the money and the taking of the note was a simultaneous transaction, and the parties all along contemplated

(1) (1881) I. L. R., 7 Cal , 256

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that the loan should be secured by the giving and the receiving of the note, the plaintiff must stand or fall by the claim based upon the promissory note, and that if he is unable to give the note in evidence the whole suit fails For this purpose he relies, as we have stated above, upon the case of *Sheikh Akbar* v *Sheikh Khan*

The facts in that case were somewhat peculiar But there is no doubt that the giving of the note was the consideration for the deposit of a certain sum of money by the plaintiff GARTH, C J, in holding that the plaintiff must stand or fall by his claim on his promissory note, says as follows (at page 260 of the Report) —"But when the original cause of action is the bill or note itself, and does not exist independently of it, as for instance, when in consideration of A depositing money with B, B contracts by a promissory note to repay it with interest at six months' date, here there is no cause of action for money lent or otherwise than upon the note itself, because the deposit is made upon the terms contained in the note, and no other In such a case the note is the only contract between the parties, and if for want of a proper stamp, or some other reason, the note is not admissible in evidence, the creditor must lose his money"

It is contended that what the learned Chief Justice meant was that wherever a loan and the giving of a note are simultaneous, the plaintiff cannot fall back upon his claim for money lent If this be the view of the learned Chief Justice, we are unable to agree with him As far back as the year 1800, Lord KENYON, in the case of *Farr* v *Price* (1), after holding that the plaintiff could not succeed on a promissory note on the ground of an error in the stamp observed that "as there were other general counts in the declaration, if the plaintiff could give other evidence of a consideration paid by him to the defendants, he would not be concluded from recovering by the fact of the defendants having given this imperfect promissory note for it"

There is a footnote to the report as follows —"Where a promissory note had been given for money lent but when produced in court was unstamped, Lord KENYON, Chief Justice, permitted the plaintiff to recover on a common count for money

(1) (1800) 1 East, 55 (57)

lent by proving that when the money for which the loan had been given was demanded of the defendant he acknowledged the debt"

The case of *Sheikh Akbar* v *Sheikh Khan* was considered in *Pramatha Nath Sandal* v *Dwarka Nath Dey* (1) There, as in the present case, a promissory note had been given for money lent, but the note was insufficiently stamped, and was therefore inadmissible in evidence It was held that the plaintiff had a cause of action independently of the document PETHERAM, C J, says (at page 853 of the Report) —"The case which has been relied upon by the defendant is that of *Sheikh Akbar* v *Sheikh Khan*" The learned Chief Justice then quotes the passage from the judgement of GARTH, C J, which we have mentioned above and proceeds —"These words taken alone may seem to indicate that when a bill or note is taken for a debt, the action must be brought upon the bill or note, and that if for any reason the document is excluded, the action must fail, but a reference to the earlier portion of the judgement shows that such was not the meaning of the Chief Justice, and that when he spoke of a deposit he did not mean a loan, as he then says where money is lent and a bill or note given for the loan which is not paid at maturity, the creditor may disregard the note and sue on the original consideration"

In the case of *Krishnaji Narayan Parkhi* v *Rajmal Manikchand Marwari* (2), where the suit was a suit exactly similar in principle to the present case, JENKINS, C J, also quotes the judgement of GARTH, C J, in *Sheikh Akbar's* case and says (at page 363 of the report) —"It is apparent from this that the actual *ratio decidendi* was that there was no loan independently of the note, so that it does not govern this case, if, as I think, there was a loan independently of the note"

The Chief Justice was clearly of opinion that where the loan could be proved without having recourse to the note the plaintiff was entitled to recover In the same case CANDY, J, took the same view, and refers at length to the authorities]

(1) (1896) I. L. R., 23 Calc., 851 (2) (1899) I. L. R., 24 Bom., 360.

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In the case of *Virbhadrapa bin Adrashapa Javli* v *Bhimaji Balaji Saraff* (1) the question arose whether or not the drawing of two parallel lines over a receipt stamp was, or was not, an effectual cancellation of it It was held that it was not The court then went on to consider whether the plaintiff could be allowed to sue for money lent independently of the promissory note, and held that the plaintiff could sue

The same view was taken by a Bench of this Court consisting of STANLEY, C J, and KNOX, J, in the case of *Banarsi Prasad* v *Fazal Ahmad* (2) The learned Chief Justice and Mr Justice GRIFFIN adhered to the same view in *Sri Nath Das* v *Amjad Singh* (3)

The only case really in point, where a contrary view was taken, was the case of *Parsotam Narain* v *Taley Singh* (4) In that case, no doubt, AIKMAN, J, held that where the parties contemplated at the time of the loan that a note should be taken, the plaintiff must stand or fall by a suit based on the note itself It is quite clear that the learned Judge relied upon what he supposed was the view of SIR RICHARD GARTH in *Sheikh Akbar's* case We are unable to follow this case, in view of our own opinion and the authorities we have quoted We consider that, where the plaintiff, as in the present case, is able to prove the loan independently and without the assistance of the note, he ought to succeed

We accordingly allow the appeal, and vary the decree of the lower appellate court by restoring the decree of the court of first instance with costs in all courts

Appeal decreed.

(1) (1901) I L R 23 Bom 432
(2) (1905) I L R 29 All., 293
(3) (1910) 7 A L J, 459
(4) (1903) I L R 26 All, 178

Before Mr Justice Banerji and Mr Justice Tudball

1911
November 22

ABDUL HAKIM KHAN AND ANOTHER (DEFENDANTS) v CHANDAN AND OTHERS (PLAINTIFFS)

Act No XVI of 1908 (Indian Registration Act) sections 73 74 77—Registration—Refusal to register—Inquiry ordered but application dismissed on account of parties failing to attend—Suit to compel registration

A Sub-Registrar refused to register a document presented to him and on the application of one of the parties the Registrar directed an inquiry under section 74 of the Indian Registration Act 1908 On the date fixed for the inquiry however, the parties failed to appear and the Registrar accordingly dismissed the application. *Held* that this amounted to a refusal to register within the meaning of section 77 of the Act and a suit to compel registration would lie *Sajibullah Sirkar* v *Haji Khoh Mohamed Sirkar* (1) followed *Udit Upadhia* v *Imam Bandi Bibi* (2) distinguished

THE facts of this case were as follows —

A sale deed was executed by the defendants appellants in favour of the plaintiffs respondents on the 14th of July, 1908 On the 1st of September, 1908, the plaintiffs applied for registration Notice was issued to the defendants, but they did not appear, and registration was refused by the Sub Registrar on the 20th of December, 1908 On the 6th of January, 1909, the plaintiffs applied to the Registrar under section 73 of the Registration Act A date was fixed for holding the inquiry, but as neither party put in an appearance, the Registrar also refused registration

The plaintiffs brought the present suit for compulsory registration on the 19th of March, 1909 The defendants pleaded that the suit was not maintainable The courts below decreed the claim The defendants thereupon appealed to the High Court

Pandit *Braj Nath Vyas*, for the appellants —

The application before the Registrar under section 73 was barred, the plaint having been presented more than thirty days after the order The order of the Registrar was not an 'order refusing registration' within the meaning of section 77, it being simply an order of dismissal for default By their abandonment of all proceedings before the Registrar, the plaintiffs must be held to have failed to comply with the provisions of sections

Second Appeal No 3 2 of 1911 from a decree of C E Gutterman Additional Judge of Saharanpur dated the 27th of January 1911 confirming a decree of Jatindra Nath Banerji Subordinate Judge of Saharanpur dated the 15th of July 1909

(1) (1886) I. L. R., 13 Calc., 264 (2) (1902) I. L. R., 24 All., 402.

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ABDUL HAKIM v CHANDAN

under section 73 was not a *bonâ fide* application which the plaintiffs did not intend to prosecute It is clear that they neither withdrew nor abandoned their application The Registrar's order dismissing the application was one merely refusing to register the document because no evidence of the execution thereof had been placed before him We agree with the remarks in *Sajibullah Sirkar* v *Haji Khosh Mohamed Sirkar* (1) In our opinion the decision of the court below is correct The appeal fails

Appeal dismissed

1911
November 23

Before Mr Justice Karamat Husain and Mr Justice Chamier

GANPAT PRASAD AND ANOTHER (DEFENDANTS) *v* SARJU (PLAINTIFF) *

Act No IX of 1872 (*Indian Contract Act*) *section* 235—*Principal and agent —Untrue representation by agent as to extent of his authority—Liability of agent*

Held that section 235 of the Indian Contract Act 1872 applies as much to the case of a person who untruly represents the extent of the authority given to him by another as to that of a person who represents himself to be the agent of another when in fact he has no authority from him whatever *Collen* v *Wright* (2) referred to

THE facts of this case were as follows —

One Munna Lal, who was the proprietor of a shop at Katni, had some 500 bags of grain stored at Badausa in the Banda district He authorized the defendants appellants, who owned a shop at Karwi in the latter district, to sell the above mentioned grain at the rate of 9¼ seers to rupee On the 25th of December, 1907, defendants sold the 500 bags of grain to the plaintiff respondent, Sarju, who was also a shop keeper at Karwi, at the rate of 9 seers 6 chhataks to the rupee, and the latter paid Rs 51 as earnest money Delivery was to be taken in 8 days Munna Lal prohibited the defendants from selling the grain at the lower rate, and delivery was not effected Thereupon Sarju brought a suit against Munna Lal which was dismissed on the ground that the sale was not complete The defendants were not parties to this suit The plaintiff then sued

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* Second Appeal No 335 of 1911 from a decree of Muhammad Ali District Judge of Banda dated the 25th of March 1911 modifying a decree of Achal Behari Subordinate Judge of Banda dated the 31st of January 1910

(1) (1886) I. L. R., 13 Calc., 264 (2) (1867) 27 L. J., Q. B., 215; 7 E & B., 301

e present defendants, claiming Rs 51 on account of the earnest oney paid, Rs 252-1 0, on account of costs of the former suit, nd Rs 424 0 3, on account ofloss occasioned by the represen ation of the defendants that they were authorized to sell the rain at the rate agreed upon The defence was that there was o misrepresentation and that the sale was not complete The ourt of first instance held that section 230 of the Contract Act pplied and dismissed the suit, awarding only Rs 51 on account f the earnest money paid. The lower appellate court reversed he decree, holding that the case was governed by section 235 of the Contract Act It did not award any costs of the previous itigation The defendants appealed

Dr *Tej Bahadur Sapru* (with him Munshi *Benode Bihari*), or the appellants —

The sole question is whether section 230 or 235 of the Con- ract Act is applicable Section 235 applies only to a person ntruly representing himself to be the authorized agent of nother There was no such untrue representation in the present case Agency was admitted by all parties There was no such untrue representation as comes within section 235 That section refers to an untrue representation as to the very fact of agency, not as to its terms He referred to *Collen* v *Wright* (1) and *Hoare* v *Dresser* (2)

[CHAMIER, J, referred to *Starkey* v *Bank of England* (3), and *Chr Salvesen and Co* v *Rederi Aktiebolaget Nordstjernan* (4) was also referred to by the other side]

The rule of English law is larger than the Indian law Section 235 has not been framed wide enough to cover those cases It only refers to a case of total absence of authority Sections 226 to 238 refer to cases between principal and agent or between principal and third parties None of these can apply where an agent is sued himself by a third party He is not personally bound in such a case Section 230 applies In the case of warranty, too, the Indian Legislature has given it a very narrow and limited meaning It must have been its express intention to do so

(1) 7 E and B., 301
(2) (1859) 7 H L., 290
(3) (1903) A C. 114
(4) (1905) A C., 302.

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under section 73 was not a *bonâ fide* application which the plaintiffs did not intend to prosecute It is clear that they neither withdrew nor abandoned their application The Registrar's order dismissing the application was one merely refusing to register the document because no evidence of the execution thereof had been placed before him We agree with the remarks in *Sajibullah Sirkar* v *Haji Khosh Mohamed Sirkar* (1) In our opinion the decision of the court below is correct The appeal fails

Appeal dismissed

1911
November 23

Before Mr Justice Karamat Husain and Mr Justice Chamier

GANPAT PRASAD AND ANOTHER (DEFENDANTS) v SARJU (PLAINTIFF)*

Act No IX of 1872 (Indian Contract Act), section 235—Principal and agent —Untrue representation by agent as to extent of his authority—Liability of agent

Held that section 235 of the Indian Contract Act 1872 applies as much to the case of a person who untruly represents the extent of the authority given to him by another as to that of a person who represents himself to be the agent of another when in fact he has no authority from him whatever *Collen* v *Wright* (2) referred to

THE facts of this case were as follows —

One Munna Lal, who was the proprietor of a shop at Katni, had some 500 bags of grain stored at Badausa in the Banda district He authorized the defendants appellants, who owned a shop at Karwi in the latter district, to sell the above mentioned grain at the rate of $9\frac{1}{4}$ seers to rupee On the 25th of December, 1907, defendants sold the 500 bags of grain to the plaintiff respondent, Sarju, who was also a shop keeper at Karwi, at the rate of 9 seers 6 chhataks to the rupee, and the latter paid Rs 51 as earnest money Delivery was to be taken in 8 days Munna Lal prohibited the defendants from selling the grain at the lower rate, and delivery was not effected Thereupon Sarju brought a suit against Munna Lal which was dismissed on the ground that the sale was not complete The defendants were not parties to this suit The plaintiff then sued

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* Second Appeal No 395 of 1911 from a decree of Muhammad Ali District Judge of Banda dated the 25th of March 1911 modifying a decree of Achal Behari Subordinate Judge of Banda dated the 31st of January 1910

(1) (1886) I L R, 13 Calc, 264 (2) (1857) 27 L J, Q B, 215; 7 E & B, 301

On behalf of the appellants it is contended that section 235 of the Contract Act does not apply to the case Dr *Tej Bahadur* argues that it was intended to apply only to the case of a person who represents himself to be the agent of another when in fact he has no authority from him whatever, but not to the case of a person who untruly represents the extent of the authority given to him by another Dr *Tej Bahadur* concedes that the case of *Collen* v *Wright* (1), on which section 235 is obviously based, has been applied to both classes of cases in England It seems to us clear that section 235 was intended to apply to both classes of cases There is no distinction in principle between the case of a man who represents that he has authority from another when he has no authority whatever, and the case of a man who represents that he has certain authority from another when he has authority of another description In neither case can the man who makes the representation be said to be the authorized agent of the other with reference to the matter on which he has no authority We agree also with the learned Judge of the court below that the appellants must be taken to have untruly represented themselves to be authorized by Munna Lal to sell his grain at the rate of 9 seers 6 chataks to a rupee For, as it was said in the case of *Collen* v *Wright*, if a man makes a contract as agent, he promises that he is what he represents himself to be, and he is liable for the breach of his contract, whether or not he is aware that he is acting beyond the scope of his authority In our opinion the decision of the court below is perfectly right, and we dismiss the appeal

Appeal dismissed

(1) (1857) 7 E & B., 301

1911
November 25

Before the Hon ble Mr H G Richards Chief Justice, and Mr Justice Banerji.

BANDE ALI (PLAINTIFF) v GOKUL MISIR AND OTHERS (DEFENDANTS)

Civil Procedure Code (1882), section 43—Suit for injunction—Suit dismissed on the ground that plaintiff had failed to prove his possession—Subsequent suit for possession

Held that the dismissal of a suit for an injunction in respect of certain property upon the ground that the plaintiff has not proved his possession of the property in respect of which the injunction is sought is no bar to a subsequent suit for possession of the same property The principle of the decisions in *Darbo* v *Kesho Rai* (1), *Sarsuti* v *Kunj Behari Lal* (2) and *Mohan Lal* v *Bilaso* (3) followed

THE *facts out of which this appeal arose were as follows* —

One Bande Ali brought an action against Gokul and others on the allegation that he was the owner in possession of $\frac{5}{16}$th share in a certain grove as purchaser from the heirs of one Bakas, and that the defendants had appropriated the fruit and the trees The relief sought by the plaintiff was a permanent injunction restraining the defendants 1 to 4 from cutting down the trees of the grove and for recovery of Rs 34 5 9 as the value of his share of fruit in 1303 Fasli and of certain trees appropriated by them The pleas of the defendants in that suit were, *inter alia*, that the grove had been in possession of Baha ud din, and of the defendants as mortgagees from him under a mortgage deed of the 1st of September, 1893, for upwards of twelve years before the institution of the suit, and that the suit was barred by limitation The issues framed by the court of first instance were to the following effect —(1) Was the plaintiff or his vendor in possession of the *bagh* within twelve years before the institution of the suit, or was the suit barred by time? (2) Was the suit barred by section 42 of the Specific Relief Act? (3) What were the rights and interests of the plaintiff vendor on the date of the sale deeds of the 14th and 17th of July, 1905, and what rights did the plaintiff acquire by his purchase? (4) What damages was the plaintiff entitled to? On the second issue the first court found that the plaintiff was not in possession that he ought to have claimed possession, and that his suit was barred by section 12 of the Specific Relief Act

* Appeal No 7 o 1J 0 under sec ion 10 o the Letters Pa en

(1) (1870) I L. R., 2 All., 560 (2) (1883) I. L. R., 6 All., 345
(3) (1891) I L. R., 11 All., 612

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BANDE ALI v GOKUL MISIR

On the first and third issues that court found that the title of the defendants had not ripened into ownership by adverse possession, and that the plaintiff was owner of $\frac{5}{16}$th share in the *bagh* On the fourth issue it found that in consequence of the agreement between the parties the amount of damages was Rs 15 On the above findings the first court dismissed the claim for an injunction and decreed it for damages

The plaintiff thereupon on the 13th of June, 1908, brought the suit out of which this appeal arose The reliefs sought in the present suit were the following —*(a)* A decree for establishment of the right of possession jointly with the defendants over a $\frac{5}{16}$th share of the grove, *(b)* Rs 123 7 0 on account of the produce of the grove for 1314 and 1315 Fasli One of the pleas in defence was that the suit was barred by the provisions of sections 13 and 43 of the Code of Civil Procedure The court of first instance came to the conclusion that the cause of action in the two suits being the same, the suit was barred, but it did not specify whether it was barred under section 13 or section 43 The plaintiff appealed to the lower appellate court, which reversed the decree of the court of first instance and gave the plaintiff a decree for possession of $\frac{5}{16}$ths of the grove, and Rs 31 as damages and costs

The defendants preferred a second appeal to the High Court. A single Judge of the High Court reversed the decree, holding that a second suit for possession would be barred if in a previous suit for injunction the plaintiff could not prove his possession

The judgement of the single Bench (KARAMAT HUSAIN, J as to the point of law involved was as follows —

In order to see whether section 13 explanation II or section 43 of the Code of Civil Procedure 1882 bars the present suit the following introductory remarks are necessary

The object of the rule *re judicata* observes Lord BLACKBURN is always put upon two grounds—the one public policy that it is the interest of the state that there should be an end of litigation the other hardship on the individual that he should not be vexed twice for the same cause *Lockyer* v *Ferryman* (1) Out of the two grounds vexation to a defendant more than once is the only ground on which explanation II of section 13 and section 43 of the Code of Civil Procedure rest Both of them are enacted in his interests and to save him from the repetition of vexation on a single cause of action.

(1) (1877) 2 App Cas 519

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"The expression 'cause of action' is sometimes used in the sense of some infringement by the defendant which furnishes an immediate cause of action to the plaintiff At others it is used in the sense of infringement together with the right infringed. The latter sense is wider of the two and a Full Bench of this Court has held that the cause of action in section 43 is used in the wider sense (1)

'That ruling is binding on me but with all the respect due to the learned Judges I cannot help thinking that the expression simply means some infringement of some right by some one which entitles the owner of the right to seek the assistance of the court When it is used to denote the entire group of facts which the plaintiff has to prove to have the judgement of the court in his favour it denotes the elements of success and not the cause of action The concepts of infringement cause of action and relief are closely connected with one another The one and the same act which is an infringement is also *the entire cause of action or a component element thereof and the relief is* the restoration of the owner of right to the position in which he was before the infringement and if that be impossible to compensate him for the loss In this connection I deem it my duty to observe that the words and groups of words used in expressing legal concepts ought to be used in only one sense and that each legal concept ought to be expressed by one word or group of words The practice of vaguely expressing one concept by several terms or using one term in more than one sense is a fruitful source of the multiplicity of suits and of moral and social evil of the first magnitude

The cause of action according to some rulings must be sought for within the four corners of the plaint—*Jibunti Nath Khan* v *Shib Nath Chuckerbutty* (2) *Nanoo Singh Monda* v *Anand Singh Monda* (3) But in *Nathu* v *Budhu* (4) the Court expressed an opinion *obiter* that section 43 must be applied as if the fact had been as found by the court and not alleged in the plaint This view, with due respect to the learned judges who take a different view is in my judgement sound If the determination of a cause of action is to depend upon the allegations made by the plaintiff in the plaint with a complete disregard to the pleas in defence and to the findings of the court on the pleadings of the parties matters are left to the sweet will of the plaintiff who can invent as many causes of action as suits his fancy and can drag a helpless defendant into court many times for one single cause of action in spite of the provisions of section 43 This will tend to increase the multiplicity of suits and give a handle to the malice of unscrupulous plaintiffs against innocent defendants Further if the parties to a suit be not agreed as to the cause of action it is the function of the court to find what the cause of action is and bare allegations in the plaint cannot be sufficient for determining it The allegations in the plaint may estop the plaintiffs from averring differently but they cannot furnish a sufficient basis for the determination of a cause of action Again to set the machinery of law in motion is a very serious matter and a plaintiff who intends to seek the assistance of a court is under the obligation of exercising reasonable

(1) (18 3) I L R., 16 All 160
(2) (1882) I L R., 8 Calc., 819 (822)
(3) (1885) I L R., 12 Calc 91,2
(4) (1893) I L R 18 Bom., 537 (542)

care to find out what his real cause of action is and what is the relief to which he is entitled If without doing so he rushes into court he does so at his own risk The defendant is also a party to the suit and to give preference to the allegations in the plaint over the pleas in defence in determining the cause of action in a particular suit is not consonant with justice One of the elements of explanation II is that the cause of action in the two suits must be the same If it is not the same the omission of a ground of attack or defence cannot take place Another element is that the ground must be such as could help success or failure in the previous suit A third element is that it must have been known to the party who could advance it—*Manikbai* v *Virchand* (1)—inasmuch as the party could not be barred from raising a ground which was not known to him The element of the doctrine of *res judicata* that the matter must be heard and finally decided is no element of explanation II For adjudication upon a ground which has been omitted is impossible The bar created by explanation II rests on the omission by a party and not on adjudication by a competent court This is founded on the maxim *nemo debet bis vexari pro unâ et eadem causâ* and not upon *interest reipublicæ ut sit finis litium* It has a close affinity to estoppel and has no connection with *res judicata* The absence of adjudication on the omitted ground is conclusive to show that the matter cannot be *res judicata* But as the rule of *res judicata* is treated by the English lawyer as a branch of the law of estoppel and as the practical results are the same whether the explanation finds a place under *res judicata* or under estoppel much regard has not been paid to assign a proper place to it As the omission has been dealt with under the rule of *res judicata* the courts have tried to explain how it can come under that rule In *Hari Narayan Brahme* v *Ganpatrav Davji* (2) the matter is said to be *constructively* in issue — The law of *res judicata* is contained in section 13 of Act X of 1877; but the matter in issue in the present suit was obviously not heard and finally decided by the Poona Court unless it can be said to have been *constructively* in issue in the former suit under explanations I and II of section 13 In some cases the opportunity of obtaining a decision is deemed tantamount to actual decision If the parties have had an opportunity of controverting that is the same thing if the matter has been actually controverted and actually decided—*Newington* v *Levy* (3) *per* MARTIN B citing *Greathead* v *Bromley* (4) *Langmead* v *Maple* (5) see also *per* BLACKBURN J 6 C P, p 193 *Rakhal Dasi Singh* v *Heera Motee Dossee* (6) The point that for the application of explanation II a final decision of the omitted ground is not necessary has been noticed by SHARF UD DIN and COXE JJ in *Mohim Chandra Sarkar* v *Anil Bandhu Adhikary* (7) and no reasonable doubt in the soundness of this view is possible but it is strange to find that according to some cases—*Woomesh Maitra* v *Barada Das Maitra* (8) and *Kailash Mondul* v *Baroda Sundari Dasi* (9)—the question ought not to be and cannot be treated as *res judicata* under explanation

(1) (1907) 9 Bom L R 100
(2) (1883) I L R, 7 Bom, 272
(3) (1870) L R 6 C P 180 (185)
(4) (1798) 7 T R, 456
(5) (1865) 18 C B N S 255 (270)
(6) (1874) 22 W R 292
(7) (1909) 13 C W N 513
(8) (1900) I L R, 28 Calc 17 (21)
(9) (1879) I L R 24 Calc 711

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II, unless there is a judicial determination express or implied on the matter not put directly Section 43 like explanation II deals with an omission and is based on the maxim which prohibits vexing a defendant more than once for one cause It bars a subsequent suit for a portion of the relief which is omitted in the previous suit on the same cause of action. The omitted portion of the relief is termed in second paragraph of section 43 of Act XIV of 1882 'portion of his claim, and in the third paragraph it is termed a remedy

If the term 'relief be taken in its widest sense that is the 'thing' or the object of right or the compensation therefor to which the plaintiff on the happening of a specific cause of action is entitled the 'portion of his claim and the remedy both become sub classes of the portion of the relief and the distinction between the two sub-classes turns out to be physical When his claim that is the thing claimed is of a homogeneous character such as money or tangible property, the omitted portion of the relief is spoken of as any portion of this claim When the relief consists of several component reliefs such as a simple money decree and a mortgage decree the omitted portion of the relief is spoken of as a remedy The points of agreement between explanation II and section 43 are that both deal with an omission, that the cause of action under both must in two cases be the same and that the bar in both is to avoid repeated vexation to the defendant and is due to the omission of the party and not to adjudication by the court

The points of difference between them are that the omission under explanation II is the omission of ground of attack or defence in respect of the relief while, under section 43 it is the omission of a portion of the relief itself that the omission under the former may be either by the plaintiff or by the defendant but that under the latter it must always be by the plaintiff

'A suit for a declaration is very distinct from a suit for permanent injunction The former is brought under section 42 and the latter under section 54 of the Specific Relief Act In a suit for a declaration the plaintiff may or may not be in possession of the property in respect of which a declaration is sought In a suit for a permanent injunction the plaintiff must be in possession of the property in respect of which the permanent injunction is sought. A plaintiff out of possession may sue for a temporary injunction but that is very different from a permanent one In the former a mere declaration can be made and in the latter the defendant is restrained from some infringement and hence the former decree is unfit to be executed A permanent injunction is a remedy or relief against the defendant while a declaration is a mere declaration — I can understand an injunction being a relief,—*Marsh* v *Keith* (1)—but I do not understand how a decree which declares a right merely and gives no relief can be termed a remedy *Kalidhun Chuttopadhya* v *Shiva Nath Chuttopadhya* (2) In a declaratory suit possession may be a consequential relief but in a suit for permanent injunction possession can never be a consequential relief Hence possession as a relief may be added to a declaration as a relief but it cannot be added as a relief to a permanent injunction. If the declaration of title to a property the possession of it and the

(1) (1860) 1 Dr and Sm. 342 (2) (1882) I L R., 8 Calc 483 (490)

permanent injunction to restrain from doing some irreparable damage to it be deemed to be one chain of reliefs declaration will represent the first link possession the second and injunction the third In other words declaration will precede possession and injunction will follow

It follows that a dispossessed owner ought to sue for possession and ought not to sue first for the declaration of title and next for possession inasmuch as the law is that a plaintiff will not be allowed to make two allegations when the whole matter can be disposed of in a single suit (I L R 8 Calc 483 509)

The case law however is that a previous suit for a declaration of title is no bar to a subsequent suit for possession The way in which this has come to pass is not only interesting but of material help in deciding the case before me I therefore set out its history

"The Courts of Equity in England were at one time different from the Courts of Common Law and therefore a declaration was first obtained from the Equity Courts and then a suit for consequential relief was instituted in the Common Law courts

Now in a country where there are different courts administering different portions of the substantive law it may be quite possible that a right may have to be established in one court before a consequential relief can be had in another court—*Kalidhun Chuttapadhya* v *Shiba Nath Chuttapadhya* (1) Owing to the separation of the two sets of courts the rule that a Civil Court may make a declaratory decree without consequential relief was first enacted in a statutory form in 15 and 16 Vict Cap LXXXVI section 50 That section was re-enacted in India for the old Supreme Court in section 29 of Act VI of 1854 It was then reproduced in the same form in section 15 of the old Code of Civil Procedure (Act VIII of 1859) —'No suit shall be open to objection on the ground that declaratory decree or order is sought thereby and it shall be lawful for a Civil Court to make binding declarations of right without granting consequential relief, Section 43 of the Specific Relief Act which came into force on the first of May 1877 materially altered the law on this subject The last paragraph of that section is in these terms — Provided that no court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so The above history of the legislation on the subject shows that a Civil Court under section 15 of Act VIII of 1859 had the power of making binding declarations of right without granting consequential relief and that that power was taken away by the proviso to section 42 of the Specific Relief Act. The former section in terms confers that power and the latter puts an end to it There is nothing in either of the two sections to throw any light on the fate of a subsequent suit for a consequential relief

In *Kalidhun Chuttapadhya* v *Shiba Nath Chuttapadhya* (2) there are observations which go to show that such a suit would but for section 15 be barred If section 7 stood alone unqualified by any other provision in the law it would indeed be very difficult to contend that the present suit

(1) (1882) I L R, 8 Calc 483 (501) (2) (1883) I L R 8 Calc, 483, (512)

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was not barred It is obvious that the plaintiff's real object in the first suit was to obtain an account from the defendant and that the declaratory decree with which they were then content was only a means to effect that end It would seem therefore, impossible to say, that in suing for that decree, they sued for their whole claim in respect of their cause of action But then it is contended that section 15 of the Code is intended to modify section 7 and removes any difficulty which the plaintiffs might otherwise have had in enforcing their present claim. It seems to me that this contention is well founded. I think that section 15 is intended to modify the provisions of section 7, and the present case is one of those to which the section is intended to apply This was evidently the view taken by the Allahabad High Court in *Tulsi Ram* v *Ganga Ram* (1) and I entirely agree with that decision. A reasonable inference from the above remarks is that after the repeal of section 15 of Act VIII of 1859 by section 42 of the Specific Relief Act a subsequent suit for consequential relief would be barred by the principle of section 7 of Act VIII of 1859 which was re-enacted with an enlarged scope in section 43 of Act X of 1877 and of Act XIV of 1882 Such however is not the case law *Jibunti Nath Khan* v *Shib Nath Chuckerbutty* (2) which was a case under Act X of 1877 lays down —

Where a previous suit for a declaration of title and confirmation of possession of certain land has been dismissed on the ground that the plaintiff was not in possession at the time of the suit a subsequent suit on the same title for recovery of possession is not barred under section 43 of the Code of Civil Procedure The rule is based on the following reasoning — On the whole we are of opinion that there has been no splitting of remedies in this case within the meaning of section 43 of the new Code of Civil Procedure and that this suit is not barred in consequence With due respect to the learned Judges I find myself unable to hold that there is no splitting of remedies If a consequential relief is not a portion of the relief (using that term in its widest sense) to which a plaintiff is entitled, a sum of one hundred rupees is also not a portion of five hundred rupees This case entirely ignores the observations of GARTH C J in *Kalidhun Chuttapadhya* v *Shiba Nath Chuttupadhya*(3) and the express provisions of section 43 of Act X of 1877 which raise a bar by the omission of any portion of his claim as well as of a remedy and it is exceedingly difficult to contend that a consequential relief is not a remedy which it is open to a plaintiff to seek This case is followed in *Komola Kaminy Debia* v *Lokenath Kur* (4) The learned Judges note that the point decided in *Kali Dhun's* case cannot arise under the present law as section 42 of the Specific Relief Act forbids such a suit They however go on to say — But we cannot think that where a plaintiff mistakenly believing himself to be in possession sues merely for a declaratory decree and where in accordance with this rule the court finding him not to be in possession, dismisses his suit on this ground without any inquiry into his rights he is precluded from subsequently suing for his entire cause of action

The reasoning shows that the principle of repeated vexation is made inapplicable because of the ignorance of the fact of possession at the date of

(1) (1876) I L R 1 All 252
(2) (1882) I L R., 8 Calc. 819
(3) (1887) I L R 8 Calc., 483
(4) (1882) I L R 8 Calc 825 note

suit and therefore the case is no authority for the plaintiff who at the date of his suit knows that he is not in possession and yet omits to seek that relief This case was also followed in *Mohan Lal* v *Bilaso* (1) but the judgement with the greatest possible respect is very short In *Akbar Khan* v *Turaban* (2) it is laid down that the dismissal of a suit for a declaration of title is no bar to a subsequent suit for possession The proposition is laid down as elementary *Ram Sewak Singh* v *Nakched Singh* (3) rests on the basis that in the former suit the cause of action for the relief of possession had not arisen and is therefore no authority for a case in which at the institution of the former suit the cause of action for possession exists *Tulsi Ram* v *Ganga Ram* (4) lays down as follows — The fact that at the time when the purchaser of certain lands sued with a view of confirming his title to the lands under his purchase for a decree declaring such title he was in a position to have sued for possession of the lands was no bar under the provisions of section 7 of Act VIII of 1859 to his subsequently suing for possession of the same The *ratio decidendi* will appear from the following portion of the judgement — The lower appellate court considered that section 7 applies to cases in which the plaintiff omits to seek relief in respect of a portion of his claim and not to cases in which although he may be entitled to claim more than one kind of relief he seeks for the time one remedy only In our judgement the lower appellate court has properly interpreted the provisions of the section referred to We have not now to consider whether the plaintiff ought to have obtained a declaratory decree seeing that he might have obtained that relief in an ordinary suit for possession We have to determine whether in seeking a declaratory decree to establish his purchase deed and omitting to sue for possession he can be held to have omitted any portion of the claim arising out of the cause of action he then put in suit The cause of action he then put in suit did not necessarily involve any breach of the contract to deliver possession The plaintiff might have obtained a declaratory decree without entering on the question of possession For these reasons we hold that section 7 is inapplicable This rule with reference to the terms of section 7 of Act VIII of 1859 is quite correct and the words the plaintiff might have obtained a declaratory decree without entering on the question of possession may have reference to the provisions of section 15 of that Act The rule however would be incorrect under section 43 of Act X of 1877 or Act XIV of 1882 in both of which the omission of a remedy is placed on the same footing as the omission of a portion of his claim

Darbo v *Kesho Rai* (5) also lays down that a suit for a declaration of title does not bar a subsequent suit for possession The judgement is in the following terms — In so far as the appellant now claims possession of property to which she formerly claimed a declaration of title we are of opinion that the suit is not clearly barred she is seeking a different relief and the relief she formerly sought was refused her in respect of this property on the ground that the court ought not to exercise its discretionary power of awarding a declaration of title when relief can be obtained by an ordinary suit for possession

(1) (1892) I L R 14 All 512
(2) (1908) 5 A L J 640
(3) (1883) I L R 4 All 261
(4) (1876) I L R 1 All 252
(5) (1879) I L R 2 All 856

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"A very important [illegible] in all the cases [illegible] [illegible] have been [illegible] [illegible] [illegible] the [illegible] of a permanent [illegible] [illegible] who could [illegible] [illegible] by [illegible] possession.

"The [illegible] may be disposed of in a few words. The relief sought in the present suit is different from the one sought in the former suit. The length [illegible] [illegible] ground of attack in the former suit [illegible] [illegible] possession which is sought in the present case can in no way be a ground of attack [illegible] a permanent injunction. On the analogy of the case law as to declaratory decrees it is however contended that a suit for a permanent injunction is no bar under section 43 to a subsequent suit for possession. This analogy in the first place cannot hold good, inasmuch as the former is dissimilar. A suit for a declaration of title as has already been explained stands on a footing totally different from a suit for a permanent injunction and the rule applied to a suit for declaration is not applicable to a suit for a permanent injunction. Moreover the case law regarding declaratory suits is in direct opposition to the principle which is the foundation of section 43 and is not therefore to be extended to suits for permanent injunctions. So far as I am aware there is no authority for the proposition that a suit by an owner out of possession for a permanent injunction against the defendant who holds the property in dispute adversely to him does not bar a subsequent suit for possession on the same cause of action. Such a suit on principle must be barred. I have already explained that section 43 of Act XIV of 1882 is enacted in the interest of the defendant and protects him from repeated vexation. That being the object of the rule, it is perfectly immaterial whether the repetition of vexation is in respect of a portion of the relief or in respect of an entire relief. The case of a plaintiff who omits the entire relief to which he on a specific cause of action is entitled and starts a suit for some relief to which he on that cause of action is not entitled is in no way distinguishable from the case of a plaintiff who omits only a portion of the relief. So far as the repetition of vexation is concerned the former case is worse than the latter. In the latter there is the consolation of the termination of liability for a portion of the relief but there is no such thing in the former. If the omitter of an entire relief to which he on a specific cause of action is entitled were not barred by the principle of section 43 from seeking it in a subsequent suit a wide door for the repetition of vexation would be opened and unscrupulous plaintiffs would harass innocent defendants as often as they choose by keeping the relief to which they on a specific cause of action were entitled and putting forward sham reliefs to which they were not entitled. In the previous case between the parties it was found that the plaintiff was out of possession and that the fact was known to him when he instituted the previous suit. The relief sought by him in that suit was a permanent injunction to which he was not entitled on the cause of action brought about by dispossession and the entire relief of possession to which he was entitled on that cause of action was omitted by him. With reference to those facts I hold that his present suit for possession is barred by the principle on which section 43 is founded. It

may be contended that the cause of action in the previous suit was different from the cause of action in the subsequent suit and that therefore, section 43 has no application Having regard to the findings of fact in the previous suit that the plaintiff was not in possession and that he knew that he was not in possession and to the facts that in the present suit the relief sought is based on the same cause of action which had arisen before the institution of the present suit and that no fresh cause of action save the former one is alleged I have no hesitation in holding that the cause of action in both suits is one and the same

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'The rulings relied on by the lower appellate court have no application to the facts of the case before me inasmuch as none of them deals with the fate of a subsequent suit for possession after a suit for permanent injunction on one and the same cause of action The result is that I allow this appeal set aside the decree of the lower appellate court and restore that of the court of first instance with costs

Against this judgement the plaintiff appealed

Babu *Piari Lal Banerji* (for Maulvi *Muhammad Ishaq*), for the appellant —

The present suit is not barred by section 43, Civil Procedure Code In the first suit, the plaintiff prayed for an injunction and damages He was found not to be in possession and was referred to a separate suit If the suit were one for declaration only, the present suit would not have been barred He referred to *Sarsuti* v *Kunj Behari Lal* (1), *Mohan Lal* v *Bilaso* (2), *Akbar Khan* v *Turaban* (3) There is no distinction in principle between the case of a declaration being dismissed or a suit for injunction being dismissed on the same ground

Babu *Lalit Mohan Banerji* (for Babu *Surendra Nath Sen*) On the date that he brought the first suit, the plaintiff was at any rate doubtful whether he had possession He ought to have claimed possession also The whole question is whether the suit is or is not on the same cause of action The ruling in 14 All was really the first case after the passing of the Specific Relief Act It merely follows *Jibun'i Nath Khan* v *Shib Nath Chuckerbutty*, (4) In all these cases the plaintiff said that he was in possession, but he never said so here

RICHARDS, C J, and BANERJI, J —This appeal arises out of a suit in which the plaintiff claimed joint possession of a certain share in a grove The defence was that the suit was barred by

(1) (1883) I L R 5 All 315
(2) (1892) I L R, 14 All 512
(3) (1908) I L R 31 All 9
(4) (1882) I L R, 8 Cal, 819

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section 13 of Act XIV of 1882, having regard to previous litigation between the parties. The previous litigation consisted of a suit in which the plaintiff sued the defendants for a permanent injunction restraining them from interfering with his possession and appropriating the fruits of the grove. There was also a claim for damages. This last mentioned suit was dismissed on the ground that the plaintiff was not in possession, and that neither injunction nor damages could, therefore, be claimed. The court of first instance dismissed the present suit. The court of first appeal reversed the court of first instance and held that the suit was not barred by section 43. The learned Judge of this Court in a very careful and elaborate judgement reversed the court of first appeal and restored the decree of the court of first instance. The plaintiff comes now in appeal under the Letters Patent.

Section 43 of Act XIV of 1882 is as follows:—"Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. If a plaintiff omits to sue in respect of, or intentionally relinquish, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished."

If we had to decide the question in the absence of authority, we might have some difficulty in dissenting from the view taken by our learned brother. We think, however, that the authorities show that for a long time it has been accepted in this Court and in other High Courts that the dismissal of suits of this nature on the ground that the plaintiff is not or has not proved that he is in possession, is no bar to a subsequent suit for possession. As early as the year 1879, a Full Bench of this Court in the case of *Darbo* v. *Kesho Rai* (1) decided that the dismissal of a suit for a declaration of title on the ground that the plaintiff was not in possession, was no bar to a subsequent suit for possession. It is true that the decision in that case was under section 7 of Act VIII of 1859, and it is also true that the judgement in that

(1) (1879) I. L. R. 2 All. p. 356.

case is a very short one The same question arose in *Sarsuti* v *Kunj Behari Lal* (1) In that case the majority of a court consisting of Mr Justice STRAIGHT, Mr Justice OLDFIELD, Mr Justice BRODHURST and Mr Justice TYRRELL, decided the same way, namely, that the suit was not barred That also was a decision under section 7 of Act VIII of 1859 In this case Sir ROBERT STUART, C J, who was a party to the previous decision in *Darbo* v *Kesho Rai*, dissented Again in the case of *Mohan Lall* v *Bilaso* (2) a Bench of this Court consisting of EDGE, C J, and BLAIR, J, decided that the dismissal of a suit for a declaration of title on the ground that the plaintiff was not in possession was no bar to a subsequent suit for possession The learned Judges followed *Jibunti Nath Khan* v *Shib Nath Chukerbutty* (3) The decision of this Court in *Darbo* v *Kesho Rai* (4) does not appear to have been cited to the Court in that case These cases clearly show that it has been the well established practice of this Court not to dismiss a suit for possession merely on the ground that a previous suit had been brought for a declaration of title and dismissed on the ground of the plaintiff not being in possession In the present case the previous suit was a suit for an injunction, and it was dismissed on the ground that the plaintiff was not in possession In our opinion no distinction in principle can be drawn between the dismissal of a suit for a declaration of title on the ground that the plaintiff was not in possession, and the dismissal of a suit for an injunction on the same ground Following the rulings and established practice of this Court we think that the appeal ought to be allowed We accordingly allow the appeal, set aside the decree of this Court, and restore the decree of the lower appellate court with costs

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Appeal allowed

(1) (1883) I L R 5 All 345
(2) (1892) I L R 14 All 512
(3) (1882) I L R 8 Calc …
(4) (1879) I L R, 2 All, …

1911
November 29

Before Mr Justice Karamat Husain and Mr Justice Chamier

TARA CHAND MUKERJI (PLAINTIFF) *v* AFZAL BEG AND OTHERS (DEFENDANTS)

Act No VII of 1870 Court Fees Act schedule II article 17 (vi)—Court fee payable on plaint—Suit by plaintiff in joint possession to have share partitioned—Fixed fee ten rupees

In a suit for partition where the plaintiff alleges that he is in possession and merely claims partition of the property and separate possession of his share a court fee stamp of 10 rupees is sufficient *Reoti* v *Lachhman* (1) *Wali ullah* v *Durga Prasad* (2) and *Bidhata Rai* v *Ram Charitter Rai* (3) followed

THE facts of this case were as follows —

The plaintiff sued for partition of a house in which his share was three fourths and the defendants' one fourth The plaintiff alleged that he was in joint possession with the defendants The prayer was that partition be made by metes and bounds and possession be given to the plaintiff according to his share mentioned The court fee paid was Rs 10 The lower court was of opinion that an *ad valorem* fee was needed, and, after giving time for the payment of the balance, which was not paid, dismissed the suit The plaintiff appealed

Dr *Satish Chandra Banerji*, for the appellant —

The plaintiff's allegation is that he is in joint possession The suit falls under article 17 (*vi*) of the second schedule of the Court Fees Act I rely on the case of *Reoti* v *Lachhman* (1), which followed the cases of *Kirty Churn Mitter* v *Aunath Nath Deb* (4) and *Mohendro Chandra Ganguli* v *Ashutosh Ganguli* (5) It is by the allegations in the plaint that the court fee is to be determined The latest case is that of *Bidhata Rai* v *Ram Charitter Rai* (3) The lower court has relied on the ruling in *Wali ullah* v *Durga Prasad* (2), but that ruling is not at all against me

Maulvi *Muhammad Ishaq*, for the respondents —

I rely on the cases of *Reference under Court Fees Act, section 5* (6) and *Balvant Ganesh* v *Nana Chintamon* (7)

KARAMAT HUSAIN and CHAMIER, JJ —This was a suit by the appellant for partition of a house and its appurtenances in

First Appeal No 284 of 1910 from a decree of H A Lomas Subordinate Judge of Dehra Dun dated the 24th of May 1910

(1) Weekly Notes 1900 p 90
(2) (1906) I L R 28 All 340
(3) (1907) 12 O W N, 87
(4) (1882) I L R 8 Calc 757
(5) (1893) I L R 20 Calc, 762
(6) (1894) 4 M L J 110
(7) (1893) I L R, 18 Bom 209

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TARA CHAND MUKERJI v AFZAL BEG

Dehra Dun The appellant paid a court fee stamp of Rs 10 on his plaint under the Court Fees Act, schedule II, article 17 (vi) The respondents pleaded that the court fee paid was insufficient They contended that it should be calculated on the value of the property The court below acceded to this contention and appointed a commissioner to inquire into the value of the property The commissioner reported that the value of the whole property was Rs 22,000 and that the value of the plaintiff's share therein was Rs 16,500 The court then held that the plaint should have borne a court fee stamp of Rs 57 and called on the appellant to make good the deficiency The appellant having declined to do so, the court dismissed the suit Several decisions were cited in the court below We think that it is unnecessary to set them out here

In the case of *Reoti* v *Lachhman* (1) this Court following decisions of the Calcutta High Court, held that a plaint in which the plaintiff being jointly in possession with the defendant of property prayed that the plaintiff's share might be partitioned was sufficiently stamped with a court fee stamp of Rs 10 To the same effect is the decision of this Court in *Wali ullah* v *Durga Prasad* (2) These decisions are supported by a recent decision of the Calcutta High Court in *Bidhata Rai* v *Ram Chariter Rai* (3) In all these cases it has been held that where the plaintiff, as in the present case, alleges that he is in possession and merely claims partition of the property and separate possession of his share, a court fee stamp of Rs 10 is sufficient But where the plaintiff is out of possession and claims possession and partition, then he must pay a court fee calculated on the value of the share claimed by him The decision of the court below is, in our opinion, erroneous We allow the appeal and remand the case with directions that it be re-admitted on the file of pending cases and disposed of according to law

Appeal decreed — Cause remanded

(1) Weekly Notes 1900 p 90 (2) (1906) I L. R. 28 All., 340
(3) (1907) 12 C W N., 37

1911
December 5

Before Mr Justice Tudball and Mr Justice Chamier

ISHAR DAS AND OTHERS (AUCTION PURCHASERS) *v* ASAF ALI KHAN AND OTHERS) (DECREE HOLDERS)

Civil Procedure Code (1908) order XXI rule 89—Execution of decree—Property sold by judgement-debtor to a third person after execution sale—Judgement-debtor not competent to apply to have auction sale set aside

Where a judgement debtor after the sale in execution of his immovable property, sold such property to a third party it was *held* that the judgement debtor was not competent thereafter to apply under order XXI rule 89 of the Code of Civil Procedure 1908 to have the execution sale set aside *Debi Prasad Pandit* v *Muhammad Unis Arabi* (1) approved

IN this case certain immovable property was sold at auction in execution of a decree on the 21st of August, 1910 On the 20th of September, 1910, the judgement debtor paid into the treasury the sum requisite under order XXI, rule 89, of the Code of Civil Procedure, 1908, the court being closed on that date, and, on the 5th of October, when the court reopened, applied to have the sale set aside Subsequently to the auction sale, but prior to the 20th of September, the judgement debtor had sold all his interest in the property in question, and his application was opposed by the auction purchaser mainly on the ground that after having divested himself of all interest in the property the judgement debtor was not competent to apply under order XXI, rule 89 The court of first instance allowed the judgement debtor's application The auction purchaser thereupon appealed to the High Court

Mr *W K Porter* (with him Munshi *Gulzari Lal*), for the appellants

Mr *B L O'Conor* and Mr *Abdul Raoof*, for the respondents

TUDBALL, J —*This appeal arises out of a sale of immovable* property in execution of a decree The property was sold on the 21st of August, 1910

On the 20th of September, 1910, the judgement debtor, who is the respondent in this appeal, paid into the Treasury the amount which was necessary under order XXI, rule 89, to enable him to

* First Appeal No 33 of 1911 from an order of Banke Behari Lal Subordinate Judge of Aligarh dated the 23rd of January 1911

(1) (1910) 14 Oudh Cases 33

ave the sale set aside On this date the court was closed and it d not re open until the 5th of October, 1910

It is an admitted fact that subsequently to the auction sale nd prior to the 20th of September, 1910, the judgement debtor ransferred by sale all his interest in the property to a third arty, so that on the latter date he could no longer be said to be he owner of the property On the 5th of October, he applied to he court to set aside the sale under order XXI, rule 89

To this the auction purchaser, who was not the decree holder, bjected Several points were raised by these objections, the hief one being that as the judgement debtor had parted with his nterest in the property by sale to a third party, prior to his appliation but subsequently to the sale, he was no longer qualified to pply under order XXI, rule 89 The lower court decided all he questions in favour of the judgement debtor, hence this appeal y the auction purchaser, who raises for decision the same points which were before the lower court, the chief one being that men tioned above

In my opinion the decision of the lower court on this, the chief point, is wrong Under order XXI, rule 89, "any person, either owning the property or holding an interest therein by virtue of a title acquired before such sale" may apply to have the sale set aside This language clearly precludes the transferee from the judgement debtor in the present case from making any such application Does the fact that the judgement debtor has parted, by sale, with the whole of his interest, after the auction sale, also preclude him from making the application? The lower court has held (and the same argument has been pressed upon us in this Court) that after the auction sale and until it is set aside, no interest is left to the judgement debtor capable of transfer, and hence the sale by him in this case is virtually a nullity and he therefore remains in the same position as on the date of the auction sale With this I cannot agree Until the auction sale is confirmed the judgement debtor has a very substantial interest in the property He still retains a right either to recover his pro perty under order XXI, rule 89, or to have the sale set aside on the ground of irregularity or fraud (order XXI, rule 90), even

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Ishar Das v Asaf Ali Khan

though the title may vest in the auction purchaser from the date of the sale when once the sale has become absolute

The rule in order XXI is a special indulgence to a judgement debtor or any person holding an interest in the property at the date of the sale It gives them a last chance of saving the property *for themselves* It was never intended that the property should be saved for persons to whom the property might be sold privately after the auction sale had taken place The language of the rule (which differs considerably from that of section 310 A of the former Code) clearly points to this It clearly shuts out all persons who purchase or acquire an interest *after the auction sale* It seems to me that the Legislature had clearly in mind the case of a purchaser at a private sale from the judgement debtor after the sale in execution, in respect to whose right to apply under section 310A of the old Code, there were conflicting rulings (*vide* 1 *C W N*, 279 and *I L R*, 30 Mad, 214)

It is therefore incorrect to say that the private sale in the present case was a mere nullity and that the judgement debtor remained the "owner of the property" in spite thereof

To allow the present application would, it seems to me, be to defeat the very object of the rule The person making the application is, no doubt, the judgement debtor, but the person who will benefit by it is the person who has acquired the ownership (or at least an interest in the property) subsequently to the sale in execution, the very person whom the law now in clear terms precludes from making the application The ruling in *Debi Prasad Pandit* v *Muhammad Unis Arabi* (1) is the only direct decision on the point which has been laid before the Court With that decision I am in full agreement and would hold that the judgement debtor by denuding himself of all his interest by sale to a third party after the sale in execution, is no longer the person owning the property within the meaning of order XXI, rule 89 In this view it is unnecessary to decide the minor points which arise in the case I would allow the appeal and set aside the order of the court below

(1) (1910) 14 Oudh Cases 83

CHAMIER, J —I concur I think that there can be no doubt that order XXI, rule 89, was intended to give persons owning or holding interests in immovable property the subject of an execution sale a last chance of saving the property But the words "owning such property or holding an interest therein " evidently refer only to persons who own the property or hold an interest therein at the date of the application, and whether the applicant be the owner of or only the holder of an interest in the property he must show that he acquired his title before the execution sale As I read the rule, neither the owner nor the holder of an interest who has parted with his title since the sale or who has acquired title since the sale can apply under rule 89 That was the view taken in the Oudh case cited I agree that the appeal should be allowed 1911

Ishan Das v Asaf Ali Khan

BY THE COURT —The appeal is allowed The order of the court below is set aside The sale in favour of the appellants will stand confirmed

Appeal allowed

Before Sir Henry Richards, Knight Chief Justice and Mr Justice Banerji 1911 *December, 18*

CHHITTAR KUNWAR (PLAINTIFF) v GAURA KUNWAR (DEFENDANT) *

Hindu law—Hindu widow—Co widow—Partition—Right to partition when joint enjoyment impossible

Although Hindu widows taking a joint interest in the inheritance of their husband have no right to enforce an absolute partition of the joint estate between them, yet where the widows cannot go on peaceably in the enjoyment of the property they can by mutual agreement or otherwise separately hold the property although they have no right to partition in the proper sense of the term, and the share of one will go by right of survivorship to the other notwithstanding the separation *Gajapathi Nilamani* v *Gajapathi Radhamani* (1) *Kathaperumal* v *Venkabai* (2) and *Bhugwandeen Doobey* v *Myna Baee* (3) referred to.

THE facts of this case were as follows —

One Madan Mohan Lal, a Kurmi died leaving two widows—Gaura Kuar and Chittar Kuar The latter had a daughter by him, while the former was childless Gaura applied to the Revenue Court for partition of her share The plaintiff objected

* First Appeal No 236 of 1910 from a decree of Srish Chandra Basu, Subordinate Judge of Bareilly dated the 1st of July 1910

(1) (1877) I L R 1 Mad., 290 (2) (1880) I L R. 2 Mad., 194
(3) (1867) 11 Moo. I. A., 487

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CHHITTAR KONWAR v GAURA KONWAR

and was referred to the Civil Court She accordingly brought the present suit for a declaration that according to a custom prevailing in the family, a childless widow was only entitled to maintenance and was not entitled to partition, and also that under the general law a Hindu widow cannot claim partition from her co widow The lower court found that the custom was not established It held further that a co widow was entitled to have her share partitioned without prejudice to the right of survivorship of the other widow and dismissed the suit The plaintiff appealed to the High Court

Babu *Jogindro Nath Chaudhri* for the appellant, submitted that on a proper interpretation of the *wazib ul arzes* and consideration of the evidence, the custom set up had been proved He further submitted that one of the co widows who were in possession of property could not apply for partition inasmuch as the other co widow was entitled to get her share by right of survivorship He relied on *Kathaperumal v Venkabai* (1) and *Gajapathi Nilamani v Gajapathi Radhamani* (2) A co widow cannot compel partition but she may enjoy it under a mutual arrangement, *Bhugwandeen Doobey v Myna Baee* (3) Mayne's Hindu Law, seventh edition, paragraph 554, page 752

The Hon'ble Pandit *Sundar Lal* (with him Babu *Lalit Mohan Banerji*), for the respondent was not called upon

RICHARDS, C J, and BANERJI J—The appellant, who is one of the two widows of one Madan Mohan Lal, brought the suit out of which this appeal has arisen against the other widow of the aforesaid deceased, for a declaration that the defendant, being childless, was only entitled to maintenance and had no right to have the zamindari villages belonging to her deceased husband, partitioned between the two widows It appears that Madan Mohan Lal died sometime in the year 1909 leaving two widows, who are the parties to this suit The plaintiff has a daughter, but the defendant has no issue The names of both the widows were entered in the revenue records The defendant applied to the Revenue Court for partition of a half share The plaintiff objected and was referred to the Civil Court Thereupon

(1) (1880) I L R 2 Mad 194 (2) (1877) I L R 1 Mad 290 (300)
(3) (1867) 11 Moo I A 487 (570)

she instituted the present suit. She put forward her claim on two grounds: first, that under a custom prevailing among Kurmis, to which caste the parties belong, a childless widow only receives maintenance and has no right to the estate of her husband, and secondly, that under the general Hindu law a widow cannot claim a partition.

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The court below has dismissed the plaintiff's claim, being of opinion that the custom alleged had not been proved and that as both the widows inherited the property of their husband, they were entitled to joint enjoyment of the property and to divide it between themselves for the purpose of such enjoyment.

The plaintiff has preferred this appeal, and her first contention is that the custom alleged by her is proved. We are of opinion that this contention has no force. A number of witnesses were examined, who spoke generally as to the existence of the alleged custom, but with the exception of one witness none of the others was able to refer to any instance in which a childless widow was excluded by another having a female child. The only instance which was referred to was that of Hori, but one instance does not establish a custom. The wajib-ul-arzes of some of the villages were referred to. Some of these wajib-ul-arzes are declarations made by a single owner, and even according to these wajib-ul-arzes, it is manifest that where a widow has a male child, that male child excludes the widow and the childless widow has only a right to receive maintenance from the son. In the original wajib-ul-arzes the vernacular word used is *aulad* (issue), but judging by the context it is manifest that this word was meant to apply to male issue only.

The next contention on behalf of the appellant is that under the Hindu law a widow is not entitled to claim partition. We were referred to the following cases, namely, *Gajapathi Nilamani* v. *Gajapathi Radhamani* (1), *Kathaperumal* v. *Venkabai* (2) and *Bhugwandeen Doobey* v. *Myna Baee* (3). In the case first mentioned, their Lordships, no doubt, observe that "widows taking a joint interest in the inheritance of their husbands have no right to enforce an absolute partition of the

(1) (1877) I. L. R. 1 Mad. 290. (2) (1880) I. L. R., 2 Mad., 194.
(3) (1867) 11 Moo. I. A., 487.

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(3) (1867) 11 Moo I A 487 (575)

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(3) (1867) 11 Moo I. A., 487

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joint estate between them" But their Lordships further held that where the widows could not go on peaceably in the joint enjoyment of the property, they could by mutual agreement or otherwise separately hold the property, although they had no right to partition in the proper sense of the term, and that the share of one would go by right of survivorship to the other, notwithstanding the separation In the case before us, the two widows, although entitled to enjoy the property, appear to be unable to do so peacefully unless they divide it, in fact the plaintiff in this suit has tried to exclude the defendant altogether from the whole of the property left by her husband, admitting her only to a bare right to maintenance That being so, we are unable to hold that the defendant has no right to apply for a partition such as would enable her to enjoy her share of the property of her husband for her life Such a partition would in no way affect the plaintiff's right of survivorship in the event of her surviving the defendant

The appeal therefore fails and is dismissed with costs

Appeal dismissed

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REVISIONAL CRIMINAL.

Before Sir Henry Richards Knight Chief Justice and Mr Justice Banerji.

EMPEROR v BALMAKUND

Act No II of 1899 (Indian Stamp Act) section 65—Receipt—Money remitted by postal money order and receipt signed on post office form—Further receipt not exigible from payee

Where money is remitted by postal money order and the payee has signed the receipt in duplicate on the post office form he cannot legally be compelled to give a further receipt to the payer and his refusal to do so will not render him liable under *section 65 of the Indian Stamp Act 1899*

THE facts of this case were as follows —

One Gotting sent a postal money order for Rs 34 from Mokamah to Balmakund at Allahabad, in part payment of a particular debt Balmakund signed the usual receipts on the money order form, and the receipt intended for the remitter was sent in due course by the post office to Gotting and received by him He thereafter demanded from Balmakund a duly stamped receipt

Criminal Revision No 338 of 1911 from an order of C Rustamji Esq Sessions Judge of Allahabad dated the 14th of January 1911

which should mention that the payment was received on account of a certain specified debt Balmakund refused to give this further receipt Gotting thereupon complained to the Collector, who sanctioned the prosecution of Balmakund under section 65 of the Stamp Act The prosecution resulted in a conviction and a sentence of Rs 50 fine, which were upheld by the Sessions Judge in revision Balmakund thereupon applied in revision to the High Court

Munshi *Gulzari Lal*, for the applicant —

The money order receipt is a good and sufficient receipt, and it was not incumbent upon the applicant to give another receipt The definition of "receipt" contained in section 2, clause (23) of the Stamp Act, does not make it necessary in a receipt to say on what account the money has been received, it is enough if it is an acknowledgement of payment A receipt need not be addressed to any particular person The money order receipt is an acknowledgement of payment of the sum 'specified on the reverse" The name of the payer and the amount are both "specified on the reverse" The receipt is therefore, a complete and sufficient receipt The question remains whether it is a good receipt, it is, because by Government notification a money order receipt is exempt from stamp duty If a stamp of one anna were put on the money order receipt there could be no question that it would be a "duly stamped receipt" within the meaning of section 30 of the Stamp Act, and that no second receipt could be demanded The stamp was not put on it as the necessity for it was obviated by the Notification There are other cases of exemption, for example, a receipt for a barrister's fee If a barrister gives an unstamped receipt for his fee, a second "duly stamped receipt" cannot be demanded from him Strictly speaking, the money was actually paid by the post office to the applicant, and it was the post office alone who could demand a receipt As a matter of fact, two receipts were given

The Government Advocate (Mr *A E Ryves*), for the Crown —

Mr Gotting had several accounts with Balmakund. The money which he sent was in respect of one particular account which he specified in the money order coupon. He was entitled

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to have the money applied towards that particular account and to obtain a receipt specifying accordingly The money order receipt is not a good and sufficient receipt as it does not mention the account on which the money is paid To hold otherwise would lead to great confusion and inconvenience The money order receipt is not intended to constitute or take the place of a receipt by the payee to the remitter Its function is merely to discharge the liability of the post office, to satisfy the remitter that the money entrusted by him to the Post Office has been duly paid The post office acts merely as an agent Then, the money order receipt cannot be called a "duly stamped" receipt within the meaning of section 30, for it is not "stamped" at all The object of the Government in exempting money order receipts from stamp duty was only to obviate the necessity of an inquiry in each case by the post office as to whether the payment was without consideration or came under any other exemption or not

RICHARDS, C J and BANERJI, J —This is an application in revision The facts are undisputed and very simple One Mr Gotting sent a money order for Rs 34 to the applicant Balmakund Gotting intended that the Rs 34 should go in part payment of a certain debt due on a bond The money was received on the 14th of September, 1910, by Balmakund, who, in the usual way, signed in a duplicate receipt and delivered the same to the post office official One receipt is in the following form —

ACKNOWLEDGEMENT

"This is a duplicate receipt which will be returned by the post office to the remitter

I acknowledge to have received payment of money order No 3438 for the sum specified on the reverse

Date 1910 Signature (in ink) of payee or thumb impression of payee if illiterate

The reverse side is in the following form —

ON POSTAL SERVICE

"Amount of order (in figures) —Rs 34 0-0

Name of remitter —Mr A W Gotting.

' Address —Locomotive Department

' Stamp of the office of issue —Mokamah Patna '

The other receipt is in the following form —

"Received payment of the sum specified on the reverse

' Dated 1910, Signature (in ink) of payee or thumb impression if payee is illiterate

'Paid by me Rs As
'Signature and designation of official who paid the amount'

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On the reverse are the particulars of the amount of the order in words, the name and address of the payee in full This latter receipt is kept by the post office officials Mr Gotting for reasons of his own, (probably because he was anxious to have a receipt which would show on the face of it an acknowledgement from Balmakund of part payment of the particular debt which he intended in part to discharge) demanded from Balmakund a duly stamped receipt Balmakund refused, contending that the receipt which he had given when he received the money order was sufficient Later on, on the 3 th of October 1910, however, Balmakund did send a stamped receipt but more or less under protest, still contending that the receipt which he had signed was sufficient compliance with the law Subsequently sanction was obtained for the prosecution of Balmakund under section 65 of the Stamp Act It was probably due to apprehension of such prosecution that Balmakund signed the stamped receipt to which we have just now referred The result of the prosecution was that Balmakund was fined Rs 50 An application was made to the Session Judge in revision which application, however, was refused Hence the present application to this Court

It is contended on behalf of the applicant that under the circumstances the conviction is illegal Mr *Ryves*, on behalf of the prosecution, admits that the punishment is somewhat severe, but contends that the conviction was quite legal, and that an offence was committed under the Stamp Act The question for us to decide is whether or not the conviction is legal Section 63 of the Stamp Act provides that any person who, being required under section 30 to give a receipt, refuses or neglects to give the same, shall be liable to a fine which may extend to Rs 100 Section 30 is as follows —"Any person receiving any money exceeding Rs 20 in amount, or any bill of exchange, cheque or promissory note, for an amount exceeding Rs 20, or receiving in satisfaction of a debt any movable property exceeding Rs 20 in value shall, on demand by the person paying or delivering such money, bill, cheque, note or property, give a duly stamped receipt for the same It is clear that had Mr Gotting made the payment himself or through an agent, he would have been entitled to get a receipt

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EMPEROR v. BALMAKUND

for the amount of money which he paid and that such receipt should be duly stamped It is also clear that under such circumstances Balmakund would have been liable to a conviction if he refused to give such duly stamped receipt The money, however, was remitted through the post office in the manner to which we have already referred Section 9 of the Stamp Act provides that the Governor General in Council may by rule or order published in the "Gazette of India" reduce or remit certain duties, including the duty payable upon certain instruments By Notification No 735 S R, dated the 17th of February, 1899, the Governor General in Council in the exercise of the powers conferred by the aforesaid section, remitted the duties chargeable on certain instruments which are specified at the foot of the order No 30 is "Receipt endorsed by the payee on a postal money order" It would thus appear that Balmakund gave a receipt in duplicate to the post office authorities, acknowledging the receipt of the money which Mr Gotting had sent, and that that receipt is expressly exempted from duty by an order of the Governor General in Council duly made in exercise of the powers conferred by the Stamp Act itself The actual person who made the payment was not Mr Gotting It was the post office official This official got, as he was entitled to get a receipt in duplicate, and the post office regulation provided that the duplicate was to be given by the post office authorities to Mr Gotting If it can be said that the money was paid by Gotting at all, it can only be upon the ground that the post office official was the agent of Gotting It seemed to us most unreasonable that a person who receives money from an agent and gives a valid receipt to such agent, should be required to give another receipt to the principal Had the money been sent by the hand of an ordinary agent instead of through the post office it could not, we think, be argued for one moment that the agent would be entitled to receive a duly stamped receipt, and that his principal would be entitled to receive a second duly stamped receipt What reasonable object could be gained by the giving of a second receipt in the present case? Section 30 does not require a person receiving money to specify the particular purpose for which the money was paid He is only required to give a receipt for the sum paid Under these circumstances we think

that Balmakund ought not to have been convicted under section 65 for having refused to give a second receipt to Gotting We accordingly allow the application, set aside the conviction and sentence, and direct that the fine, if paid, be refunded

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EMPEROR v BALMAKUND

Conviction set aside

REVISIONAL CIVIL

1911
December, 20

Before Mr Justice Karamat Husain and Mr Justice Chamier

AJUDHIA PRASAD (APPLICANT) v RAM LAL AND ANOTHER (OPPOSITE PARTIES) *

Criminal Procedure Code section 195 (7) clauses (a), (b) and (c)—Sanction to prosecute—Sanction refused—Further application— Case —' Principal court of original jurisdiction

In a suit for arrears of rent exceeding Rs 100 a decree was passed in favour of the appellant In course of execution proceedings the respondents made certain statements which according to the appellant were false The appellant applied for sanction to prosecute them under section 195 clause (7) of the Code of Criminal Procedure. The sanction was refused by the Assistant Collector

Held on application made to the District Judge to grant sanction that no such application lay The ' case in connection with which an offence was alleged to have been committed was the proceedings in execution from which no appeal lay and the District Judge was not in relation to such proceedings the principal court of original jurisdiction '

THE facts of this case are thus stated in the following order of TUDBALL, J , referring the case to a Bench of two Judges —

" The facts of this case are briefly as follows —A suit for arrears of rent was brought in the court of an Assistant Collector of the first class for a sum of over one hundred rupees. It was decreed and the decree holder subsequently brought the decree into execution In the course of the execution proceedings two statements were made by the opposite parties which the present applicant deems to be false He applied to the court of the Assistant Collector for sanction That officer refused Thereupon the present applicant went to the District Judge to have the order refusing sanction set aside. The District Judge held that he had no jurisdiction in the matter and that clause (c) of sub-section 7 of section 195 of the Code of Criminal Procedure applied to the matter as there is no appeal in execution proceedings in the Revenue Court He held that as a District Judge he was not the principal court of original jurisdiction within the meaning of clause (c) sub-section 7 The applicant has come here in revision and pleads that the District Judge has refused to exercise jurisdiction which the law has given him. On behalf of the opposite parties it was pleaded that in all cases in which no appeal lies in order to find out which is the principal court of original jurisdiction within the meaning of this clause one must look to the nature of the case. If it is a criminal case in which no appeal lies then the principal court of original

* Civil Revision No 37 of 1911

1911

AJUDHIA PRASAD v RAM LAL

jurisdiction will be the principal court of original criminal jurisdiction If it is a suit in a Revenue Court where no appeal lies the principal court of original jurisdiction within the meaning of this clause will be the principal original court of revenue jurisdiction My attention has been drawn by the applicant to a ruling of this Court in *Wazir Muhammad* v *Hub Lal* (1) As I have personally some doubt as to the correctness of that decision and as present aspect of the case does not seem to have been placed before that court I think it would be better to refer this matter to a bench of two Judges I order accordingly '

On the case coming up for hearing before a bench of two Judges,

Mr *A H C Hamilton*, for the applicant —

The District Judge was wrong in refusing to exercise jurisdiction As the suit was one for arrears of rent, an appeal would lie to the District Judge under section 177 of the Tenancy Act, and therefore, under section 195 (7), sub clause (*b*) of the Code of Criminal Procedure the applicant was right in applying to the District Judge against the order of the Assistant Collector refusing sanction If the particular proceedings are considered, and if it be held that no appeal would lie from an order passed by a Revenue Court in execution proceedings, then the case would be governed by clause (*c*) of section 195 (7), and the District Judge would be the principal court of original jurisdiction In either case, therefore, whether sub clause (*b*) or sub clause (*c*) applied, the District Judge was the proper court which could exercise jurisdiction

Babu *Piari Lal Banerji* (for Pandit *Uma Shankar Bajpai*), for the opposite party —

Neither clause (*b*) nor clause (*c*) would give jurisdiction to the District Judge The words "nature of the case" used in clause (*b*) mean "nature of the case pending" which in the present instance was an "execution case" The word 'case' does not mean 'suit,' and it would not be proper to refer back to the original suit or to consider what its nature was The proceedings which were pending constituted the 'case,' and it was the nature of these proceedings which had to be looked to The offence was alleged to have been committed not in connection with the suit, but in connection with the execution case If in all cases a reference to the nature of the suit were made, various anomalies would

(1) (1909) I L R 31 All., 313

result For example, under section 171 an Assistant Collector of the second class, is empowered to dispose of all execution applications, notwithstanding that the suit might have been decided by an Assistant Collector, of the first class, and all orders passed in execution by the Assistant Collector, of the second class, are appealable under section 176 to the Collector It would be a grave anomaly to let the Collector hear an appeal from an order in execution proceedings and to let the District Judge hear an appeal from an order granting or refusing sanction in respect of an offence committed in connection with the execution application, and that would be the result if 'nature of the case' meant 'nature of the original suit' Clause (c) deals with cases where no appeals lie This might mean either (1) where no appeals lie from the decision of the particular tribunal having regard to the constitution of the tribunal, or (2) where no appeals lie from the particular decision having regard to the nature of the particular case In the present case it is immaterial which of the two meanings is given to the clause The clause goes on to say that appeal in sanction matters shall be deemed to lie ordinarily to the *principal court of original jurisdiction* These words do not always mean *principal* civil *court of original jurisdiction* The principal court of original jurisdiction would be the District Judge, the Collector, or the District Magistrate according as the case was a civil, revenue or criminal case In the present case, as sanction was refused by a Revenue Court, the principal court of original jurisdiction would be the court of the Collector

Mr *A H C Hamilton*, was heard in reply

CHAMIER, J —A suit for arrears of rent exceeding Rs 100, was brought in the court of an Assistant Collector of the first class and was decreed In the course of execution proceedings in the same court the respondents made statements which, according to the applicant, were false The applicant then applied to the Assistant Collector for sanction to prosecute the respondents That officer refused to give sanction and the applicant then went in appeal to the District Judge, who threw out the appeal on the ground that he had no jurisdiction to hear it This is an application for revision of the order of the District Judge On behalf

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of the applicant it is contended that the case is governed by clause (*b*) of sub section (7) of section 195 of the Code of Criminal Procedure, and that on a proper construction of that clause the District Judge had jurisdiction It is contended further that he had jurisdiction even if clause (*c*) of the same sub section is held to be applicable, and that one or other of these clauses must apply to the case As regards clause (*b*) the argument for the applicant is that the *case* in connection with which the offence is said to have been committed, was a suit for rent exceeding Rs 100, against the decree in which an appeal lay to the District Judge, therefore the Assistant Collector, who refused sanction, must be deemed, for the present purpose, to be subordinate to the District Judge, who accordingly ought to have entertained the applicant's appeal To this the respondents reply that the *case* in connection with which the offence is alleged to have been committed, was *the execution proceeding, the order in which* was not appealable, therefore clause (*b*) does not apply

The applicant contends that even if clause (*b*) held to be inapplicable, clause (*c*) cannot apply, because the opening words of the clause "where no appeal lies" refer only to cases in which no appeal lies against any decisions of the court, and that the words do not mean as contended by the respondent "when no appeal lies in the case in connection with which the offence is alleged to have been committed" In the alternative the applicant contends that if clause (*c*) applies the court indicated is the court of the District Judge To this the respondents reply that the principal court of original jurisdiction under the Tenancy Act is the court of the Collector

The word "case" has been the subject of many conflicting decisions in connection with section 622 of the Code of Civil Procedure, 1882, and section 115 of the present Code I do not think that any useful purpose would be served by a reference to those decisions, for the word must be construed with due regard to the context that it appears in, and the purpose for which the section of which it forms part was framed It was this consideration which led the majority of the chartered High Courts to place a narrow meaning upon the word "case" in the section just mentioned. The object of sub section (7) of section 195 of the Code of

Criminal Procedure was to indicate the court to which a court giving or refusing sanction to a prosecution should be deemed to be subordinate within the meaning of sub section (6) as originally framed Sub section (7) provided only that the court giving or *refusing* sanction, should be deemed to be subordinate only to the court to which appeals *ordinarily* lay This produced a mass of conflicting rulings and clauses (*a*), (*b*) and (*c*) were added with a view to getting rid of the difficulty Clause (*a*) provides for the case of a subordinate court against whose decisions appeals lie to two courts of different grades, and is plain enough Clause (*b*) provides for the case of a subordinate court against whose decisions appeals lie to two different kinds of courts Here the test is to what court did an appeal lie in the case in connection with which the offence is alleged to have been committed? The word *case* taken by itself may mean either the original case out of which arose the case or proceeding in which the offence is said to have been committed or the actual proceeding in which the offence is said to have been committed It must be construed with reference to the context in which it appears The words are "*nature of the case in connection with which the offence is alleged to have been committed*" There being a remote connection with an original suit and an immediate connection with an execution proceeding, I am of opinion that the case in connection with which the offence is alleged to have been committed is the execution proceeding According to the decisions of this Court no apppeal lies against an order of an Assistant Collector of the first class passed in execution proceedings under the Tenancy Act The result is that clause (*b*) does not apply Does clause (*c*) apply? The opening words of the clause "where no appeal lies" do not appear to me to refer to courts against none of whose decisions an appeal lies, but to refer to particular cases in which no appeal lies The whole sub section seems to be confined to courts against whose decisions or some of whose decisions appeals do lie, for the opening words are,—"For the purposes of this section every court shall be deemed to be subordinate only to the court to which *appeals from the former court ordinarily lie*" (the italics are mine) The result of this construction is possibly that the Legislature has made no provision in section 195 for an appeal against

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an order of a Small Cause Court giving or refusing sanction, and it may be that the only court which can interfere with such an order is the High Court This result may not have been contemplated, but the construction advocated by the applicant seems to me to be clearly inadmissible It would have been another matter if clause (c) had formed a separate sub section I hold that clause (c) applies to the present case, and therefore the applicant should have appealed to *"the principal court of original jurisdiction"* I can discover no justification for reading these words as if they were *"principal court of original civil jurisdiction"* The clause applies to all classes of cases, and it is impossible to suppose that the Legislature intended the principal court of original civil jurisdiction to revise the orders of Criminal and Revenue Courts with which it has no concern as a Civil Court The circumstance that District Judges in this province generally *have the powers of Sessions Judges and hear appeals in Revenue* cases, seems to be wholly irrelevant The principal court of original jurisdiction under the Tenancy Act is clearly not the court of the District Judge

For the above reasons I am of opinion that the District Judge was right in declining to entertain the applicant's appeal, and I would dismiss this application with costs

KARAMAT HUSAIN, J —I am of opinion that the word "case" in clause (*b*), sub section (7), of section 195 of the Code of Criminal Procedure (Act No V of 1898), means the actual proceedings in which the offence is said to have been committed and not the original case out of which those proceedings arose I am also of opinion that the opening words of clause (*c*), sub section (7) of section 195 of the Code "where no appeal lies" refer to cases in which no appeal lies and not to courts against the decisions of which there is no appeal It was so held by me in *Wazir Muhammad* v *Hub Lal* (1) In that ruling it was assumed that the court of District Judge was the principal court of original jurisdiction That, however, is not the case, and the nature of the proceedings in which sanction is given or refused is to determine the principal court of original jurisdiction

(1) (1909) I L R 31 All 313

For the above reasons I agree with my learned brother in dismissing the application

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AJUDHIA PRASAD v RAM LAL

BY THE COURT —Order of the Court is that the application be dismissed with costs

Application dismissed

MATRIMONIAL

1911 December, 22

Before Mr Justice Chamier

ESTHER MARIE JACKSON (PETITIONER) v FREDERICK ORMOND LAYLAND JACKSON (OPPOSITE PARTY) *

Act No IV of 1869 (Indian Divorce Act) section 57—Marriage—Remarriage of petitioner in divorce proceedings within six months of the decree becoming absolute

Where the successful petitioner in a suit for dissolution of marriage entered into a second marriage within six months of the decree for dissolution of marriage becoming absolute it was *held* that the second marriage was void *Warter* v *Warter* (1) followed

THIS was a suit by Esther Marie Jackson for a declaration that her marriage with Frederick Ormond Layland Jackson is null and void The parties, who are Christians, were married in Allahabad, on the 12th of January, 1910 The respondent, who had been married to another woman, had obtained in the Calcutta High Court a decree *nisi* for dissolution of that marriage, and the decree had been made absolute on the 6th of December, 1909 He believed that on the decree being made absolute, he was free to marry again, and he assured the present petitioner that all the necessary formalities had been complied with The respondent's former wife was alive when the parties were married On the above facts the petitioner claimed to be entitled to a declaration that her marriage with the respondent is null and void

Mr *R K Sorabji*, for the petitioner

The opposite party was present in person

CHAMIER, J —This is a suit by Esther Marie Jackson for a declaration that her marriage with Frederick Ormond Layland Jackson is null and void

The parties, who are Chistians, were married in Allahabad, on the 12th of January, 1910 The respondent, who had been married to another woman, had obtained in the Calcutta High

* Matrimonial suit No. 6 of 1911.

(1) (1890) 1 R., 15 P. D., 152, 59 L J., P and M 87

1911

JACKSON v. JACKSON

Court a decree *nisi* for dissolution of that marriage, and the decree had been made absolute on the 6th of December, 1909 He believed that on the decree being made absolute, he was free to marry again and he assured the present petitioner that all the necessary formalities had been complied with I find it proved that respondent's former wife was alive when the parties were married

On the above facts the petitioner claims to be entitled to a declaration that her marriage with the respondent is null and void

Section 19 of the Indian Divorce Act provides that such a declaration may be made at the instance of a wife on the ground that the former wife of the husband was living at the time of the marriage, and the marriage with such former wife was then in force Section 57 of the Act provides that when six months after the date of a High Court dissolving a marriage have expired, and no appeal has been presented against such decree to the High Court in its appellate jurisdiction or when any such appeal has been dismissed, but not sooner, it shall be lawful for the respective parties to the marriage to marry again as if the prior marriage had been dissolved by death Provided that no appeal to His Majesty in Council has been presented against any such decree There is no appeal to His Majesty in Council against a decree *nisi* for dissolution of a marriage (see section 56), therefore there can be no doubt that the "decree of a High Court dissolving a marriage" referred to in section 57 is the decree absolute not the decree *nisi* The section was construed in this way by SIR JAMES HANNEN in the case of *Warter* v *Warter* (1), where one Taylor had obtained in the Calcutta High Court a decree absolute for dissolution of his marriage on the 27th of November, 1879, and the divorced wife was married to Colonel Warter on the 3rd of February, 1880 Three days later Colonel Warter made a will in favour of his wife In April, 1881, on the advice of a solicitor, Colonel and Mrs Warter were re married at a registry office Colonel Warter having died without re executing his will or making another the question arose whether the marriage of April, 1881, revoked the will It was held that the marriage of February, 1880, was null and void, and therefore the marriage of April, 1881, was valid and revoked the will SIR JAMES HANNEN

(1) (1890) L. R. 15 P D., 152 59 L J P and M 87

said —"The Indian law, like our own, does not completely dissolve the tie of marriage until the lapse of a specified time after the decree This is an integral part of the proceedings by which alone both the parties to the marriage can be released from their incapacity to contract a fresh one" Following this decision I hold that the respondent's marriage with his former wife was still in force when he went through the form of a marriage with the petitioner

I find on the issues that the petitioner professes the Christian religion, and that the marriage between her and the respondent is null and void

I make a declaration accordingly The respondent will pay the petitioner's costs

Suit decreed

REVISIONAL CIVIL

1912
January 3

Before Mr Justice Chamier

MUTASADDI LAL (APPLICANT) *v* MULE MAL (OPPOSITE PARTY)*

Act No XII of 1887 (*Bengal N W P and Assam Civil Courts Act*) *sections* 8 (2) 21 (3)—*Assignment to Additional Judge of cases coming from a particular district—Jurisdiction*

A District Judge has power not merely to make over appeals to an Additional Judge for hearing but to direct that all appeals and other cases coming from a particular area within the judicial division shall be filed in his Court

THE facts of this case were as follows —

An application was made under section 193 of the Code of Criminal Procedure for sanction to prosecute the applicant before the Subordinate Judge of Muzaffarnagar, but it was dismissed by him An appeal was addressed to and filed in the court of the Additional District Judge of Meerut, who allowed it and granted the sanction asked for The applicant came up in revision to the High Court The case was heard by CHAMIER, J , on the 24th of November, 1911, when he called on the Additional Judge to show how he came to exercise jurisdiction in the case The Additional Judge submitted that the District Judge of Meerut had, by an order passed in 1907, directed that all appeals from the Muzaffarnagar district should be filed in his court

* Civil Revision No 75 of 1911

1912

MUTASADDI LAL v MULE MAL

Mr *C Ross Alston* (with him Mr *A H C Hamilton*), for the applicant —

Under section 21, sub section (3) of Act No XII of 1887, the District Judge has no power to assign cases in this manner It may be done by the Local Government by some general order The word 'assign' in the sub section does not mean assigned by the District Judge Ordinarily no appeals would lie in the court of the Additional Judge from an order of the Subordinate Judge They may be transferred to him for hearing, but they cannot be filed in his court There is no section empowering the District Judge to pass such an order

Dr *Tej Bahadur Sapru*, for the opposite side, referred to section 8, clause (2), of Act No XII of 1887 Section 8, clause (2), would apply if the functions of the Judge can be said to include the receiving as well as the hearing of the appeals

CHAMIER, J —On November, the 24th, I called upon the Additional Judge to explain how he came to exercise jurisdiction in this case and to forward to this Court, copies of any general or special orders bearing upon the question The report now made by the Additional Judge and the copies of orders submitted by him show that in 1907 the District Judge of Meerut assigned to the Additional Judge all appeals, applications and miscellaneous cases coming from the Muzaffarnagar district, and it is in pursuance of those orders that the present Additional Judge entertained the appeal in the present case It is contended that the District Judge had no power to make over the work of the Muzaffarnagar district to the Additional Judge and that the word *assign* in section 21, sub section (3), of the Civil Courts Act does not refer to action to be taken by the District Judge but to action to be taken by the Local Government There is no section in the Act which empowers the Local Government to *assign* to an Additional Judge work which in the ordinary course would come before a District Judge, but there is a provision in section 8, sub-section (2), to the effect that an Additional Judge shall discharge any of the functions of the District Judge which the District Judge may *assign* to him It is quite clear to me that the District Judge had power to *assign* appeals and other cases coming from the Muzaffarnagar district to the Additional Judge

Therefore the Additional Judge had jurisdiction to hear the appeal in the present case The application for revision fails and is dismissed with costs

1912

MUTASADDI LAL v MULE MAL

Application dismissed

APPELLATE CIVIL

1912 *January 8*

Before Mr Justice Karamat Husain and Mr Justice Chamier

RAJA DEI (DEFENDANT) v UMED SINGH (PLAINTIFF) *

Hindu law—Hindu widow—Suit by remote reversioner to set aside alienation by widow—Immediate reversioner a female having a life estate only—Acceleration of estate

N died leaving a widow W a daughter R D and a daughter's son K S W during the life-time of R D made a gift of the property to K S *Held* on suit by other reversioners more remote than K S for a declaration that the gift was not binding on them that the suit would lie The question of the acceleration of K S's estate would not arise because at the date of the gift the donee was not the next reversioner *Balgobind* v *Ram Kumar* (1) *Hanuman Pandit* v *Jota Kunwar* (2) and *Abinash Chandra Mazumdar* v *Harinath Shaha* (3) followed *Madari* v *Malki* (4) and *Ishwar Narain* v *Janki* (5) dissented from. *Rani Anand Koer* v *The Court of Wards* (6) referred to

THE facts of this case were as follows —

One Nagina died, leaving a widow, Musammat Waziri and a daughter, Raja Dei During the life time of the daughter, Musammat Waziri made a gift of the property to the daughter's son, Kan Singh The plaintiffs, who were the next male reversioners, brought the present suit to set aside the alienation The defendant pleaded that they had no right to sue, and that the gift merely accelerated the succession of Kan Singh

Both courts held that there could be no question of acceleration, as the gift was made not to the daughter but to the daughter's son They also held that the plaintiffs, in spite of being remote reversioners, were entitled to sue The defendant appealed

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* Second Appeal No 402 of 1911 from a decree of C E Guiterman Additional Judge of Saharanpur dated the 9th of March 1911 confirming a decree of Pramatha Nath Banerji Subordinate Judge of Saharanpur dated the 22nd of March 1910

(1) (1884) I L R 6 All 431
(2) Weekly Notes 1908 p 207
(3) (1904) I L R 32 Calc 62
(4) (1884) I L R 6 All 428
(5) (1893) I L R 15 All 132
(6) (1880) L. R., 8 I A, 14 I L R 6 Calc 764

1912

RAJA DEI v UMED SINGH

Babu *Lalit Mohan Banerji*, for the appellant, cited *Bhupal Ram* v *Lachma Kuar* (1), *Tulsha* v *Baru* (2), *Hansraj Morarji* v *Bai Moghibai* (3), *Abinash Chandra Mazumdar* v *Hari Nath Shaha* (4), *Bepin Bihari Kundu* v *Durga Charan Banerji* (5), *Madari* v *Malki* (6), *Balgobind* v. *Ramkumar* (7), *Ishwar Narain* v *Janki* (8)

Mr *Nihal Chand*, for the respondents, was not called upon

CHAMIER, J —Nagina Singh died many years ago, leaving a widow, Musammat Waziri, a daughter, Musammat Raja Dei, and a daughter's son, Kan Singh In June, 1909, Musammat Waziri, who was in possession of the estate of her husband, made a gift of it to Kan Singh The plaintiffs at once brought this suit for a declaration that the gift was not binding upon them The plaintiffs other than the present respondent, Umed Singh, are more distantly related to Nagina Singh than Umed Singh is The courts below have agreed in making a declaration as prayed in favour of Umed Singh Kan Singh died while the suit was pending in the court of first instance The appeal to the lower appellate court was filed by Musammat Raja Dei, and it is she who has filed this second appeal In this Court it is contended that at the date of the institution of this suit Umed Singh was not the nearest reversionary heir of Nagina Singh, and therefore the suit was not maintainable Indeed it is contended that even Kan Singh, supposing he had not been the donee of the property, could not have maintained a suit for a declaration inasmuch as the next reversioner was his mother, Raja Dei

There is, of course, no doubt that the nearest reversioner, who is the presumptive heir, though he may have only a contingent interest, may sue for a declaration that a transfer by a female heir in possession of the property of the last full owner does not bind the estate Upon the question whether a remote reversioner may maintain such a suit when the immediate reversioner is or rather will be the holder of a life estate only, as where the immediate reversioner is a Hindu female, there is some conflict of

(1) (1888) I L R 11 All 253
(2) (1908) 4 A L J 677
(3) (1905) 7 Bom L R 629
(4) (1904) I L R 32 Calc 62
(5) (1908) I L R 35 Calc 1066
(6) (1884) I L R 6 All 428
(7) (1884) I L R. 6 All. 431
(8) (1893) I L R 15 All 132

authority in this Court In *Madari* v *Malki* (1) STRAIGHT and BRODHURST JJ, held that such a suit could not be maintained unless the immediate reversioner was shown to be in collusion with the heir in possession, but in *Balgobind* v *Ram Kumar* (2) OLDFIELD and MAHMOOD, JJ, held that such a suit could be maintained

In *Ishwar Narain* v *Janki* (3) TYRRELL and BLAIR, JJ, refused to follow the decision in the latter case and adopted the view taken in the former case In the case of *Hanuman Pandit* v *Jotī Kunwar* (4), my learned colleague, after referring to several decisions of this and other courts, said that he preferred the decision in *Balgobind* v *Ram Kumar*, and the same view was taken in *Dirgbijai Singh* v *Jagannath Singh* (5), which is the latest case in this Court The balance of authority in the Calcutta High Court is clearly in favour of the view taken in *Balgobind* v *Ram Kumar*, and the Madras High Court have held in several cases that such a suit can be maintained by a remote reversioner when the immediate reversioner is a female entitled to a life estate only I have myself in several cases in Oudh followed the view taken by OLDFIELD and MAHMOOD, JJ, in *Balgobind* v *Ram Kumar* by the Madras High Court and by many Judges in the Calcutta High Court and I am content to adopt the arguments contained in the judgement of MAHMOOD, J, and in the judgement of BRETT and MOOKERJEE, JJ, in the latest case in the Calcutta High Court *Abinash Chandra Mazumdar* v *Harinath Shaha* (6) I am of opinion that a remote reversioner presumptively entitled to the full ownership of the property can maintain such a suit as this, where the immediate reversioner is a female who will take, if anything, a limited or life estate only The existence of Raja Dei, then, in my opinion, offers no bar to the maintenance of the present suit Nor in my opinion is the maintenance of the suit barred by the fact that Kan Singh was at the date of the institution of the suit the next reversioner presumptively entitled to the full ownership of the

(1) (1884) I L R 6 All 428
(2) (1884) I L R 6 All. 431
(3) (1893) I L R 15 All 132
(4) Weekly Notes 1905 p 207
(5) F A No 210 of 1910
(6) (1904) I L R 32 Calc 62

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RAJA DEI *v* UMED SINGH

property In *Rani Anund Koer* v *Court of Wards* (1) their Lordships of the Privy Council said —

"If the nearest reversionary heir refuses without sufficient cause to institute proceedings or if he has precluded himself by his own act or conduct from suing or has colluded with the widow or concurred in the act alleged to be wrongful, the next presumptive reversioners would be entitled to sue"

These remarks clearly cover the present case where the nearest reversionary heir was a female who supports the alienation in question and the nearest reversionary heir presumptively entitled to the full ownership of the property was the person in whose favour the transfer complained of was made In my opinion the courts below were right in holding that the respondent, Umed Singh, was competent to maintain this suit It has not been suggested that they did not exercise a wise discretion in making a declaration in his favour I would observe in conclusion that no question of acceleration of estates arises here, for Kan Singh, the donee, was not the next reversioner I would dismiss the appeal with costs

KARAMAT HUSAIN, J —I agree with my learned colleague in the order proposed by him

BY THE COURT —Order of the Court is that the appeal be dismissed with costs

Appeal dismissed

1912
January 10

REVISIONAL CRIMINAL

Before Mr Justice Tudball

EMPEROR *v* BANSI AND OTHERS *

Act No XLV of 1860 (*Indian Penal Code*) *section* 426—*Act No VIII of* 1873 (*Northern India Canal and Drainage Act*) *sections* 7 70—*Cutting walls of canal—Mischief—Penal provisions of the Canal Act not exclusive of the Indian Penal Code*

Held that section 70 of the Northern India Canal and Drainage Act 1873 does not bar the prosecution of an accused person under any other law for any offence punishable under the Canal Act *held* also that it is an act of wilful mischief punishable under the Indian Penal Code for any person to make a breach in the wall of a canal

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* Criminal Revision No 634 of 1911 from an order of E C Allen Sessions Judge of Mainpuri dated the 28th of October 1911

(1) (1880) L. R. 8 I A., 14 I L R 6 Calc 764

IN this case the applicants were convicted of having cut a canal bank for the purpose of irrigating their fields They were charged under section 430 of the Indian Penal Code and sentenced to one year's imprisonment by the Magistrate which was reduced by the Sessions Judge to three months The applicants applied to the High Court in revision

Mr *C Dillon*, for the applicants —

There is no evidence of a diminution in the supply of water The case comes properly under section 70 of the Canals Act, (VIII of 1873), and not under section 430 of the Indian Penal Code It is not proved what class of canal was cut It was a time of general scarcity The offence is very trivial He cited *Emperor v Tajuddin* (1)

The Assistant Government Advocate (Mr *R Malcomson*) for the Crown —

There is no necessity to prove diminution of water supply, the mere cutting of the embankment is an offence by itself

TUDBALL, J —The applicants have been convicted by the Magistrate of an offence under section 430 of the Indian Penal Code They were sentenced to one year's rigorous imprisonment each On appeal the Sessions Judge reduced the sentence to three months' rigorous imprisonment In revision it is urged on their behalf that the convictions should be really under section 70 of Act VIII of 1873, in the absence of evidence to show that any diminution of the supply of water for agricultural purposes was caused or likely to be caused by the act done by the applicants The object of this application is really to secure a reduction of sentence I have examined the record, and there is nothing in the evidence to show of what class the canal was, the bank of which was cut, that is, whether it was the bank of a main canal or of a distributary It is impossible in the absence of evidence on the point to hold that the act done was one which caused or was likely to cause a diminution of the supply of water for agricultural purposes It appears that the applicants wanted water for the purpose of sowing their field As they were unable to obtain it in a lawful manner, they proceeded to steal it As the record stands, it is impossible to uphold the conviction under

(1) Weekly Notes 1908 p 65

1912

EMPEROR v. BANSI

section 430 of the Indian Penal Code In any case mischief was committed It is an act of wilful mischief for any person to make a breach in the wall of a canal It is an act which causes such a change in property as destroys or diminishes its value or utility or affects it injuriously There is nothing on the record to show the extent of damage done The conviction must, therefore, be held under section 426 of the Penal Code It is true that the act is also covered by section 70 of the Canal and Drainage Act But the offence committed is far from trivial Section 7 shows clearly that section 70 does not bar the prosecution under any other law of any offence punishable under the Canal Act The maximum sentence under section 426 is three months' rigorous imprisonment The sentence upheld by the lower appellate court is, therefore, not in excess of the maximum allowed by law The offence is a serious one and the act done might have resulted in very great loss, not only to the accused but to other persons as well In the circumstances of the case I see no object in interfering with the sentence as maintained by the lower court I alter the conviction to one under section 426 of the Indian Penal Code and uphold the sentence The applicants, if on bail, will surrender

Conviction altered

PRIVY COUNCIL

P C
1911
November 2
1912
January 16

MATA DIN (DEFENDANT) *v* AHMAD ALI (PLAINTIFF)

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow]

Muhammadan law—Guardian—Construction of will—Alienation of property of minor by his brothers acting as executors of will and guardian of minor—Sale not binding on minor—Right of suit to redeem mortgage—Act No XV of 1877 (Indian Limitation Act) schedule II articles 44 and 144

A Muhammadan testator by his will left all his property to his four grandsons (brothers) but did not expressly appoint any executors of his will or guardians of such of his grandchildren as might be minors at his death nor was there in the will any intention to entrust the administration of the property to any particular individuals The testator died in 1887 and on the 15th of June 1889 the three elder grandsons on their own behalf and purporting to act also as the guardians of the fourth grandson the respondent (plaintiff) then a minor sold some of the property to the appellant (defendant) The appellant was a mortgagee of two villages on the estate under two mortgages executed by the testator on the 2nd of December 188, and the 7th of August 188, for ten years and seven years respectively and the effect of the sale had been to pay off the later mortgage on the smaller village and other debts by selling the larger village to the mortgagee The respondent attained his majority in 1892 or 1893 and treating the sale of the 15th of June 1889 as a nullity and the mortgage as still subsisting he tendered to the appellant the amount of mortgage money necessary to redeem the larger village and on the appellant refusing to accept it brought a suit for redemption on the 14th of September 190,

Held that the elder brothers were not authorized either by the will or by the Muhammadan law to act as guardians of the minor and that he was entitled on attaining his majority to treat the transaction of the 15th of June 1889 as being void as against him.

Held also that the possession of the appellant did not become adverse to the respondent until the expiry of the term of the mortgage of 188, namely the 2nd of December 1895 and therefore the suit was not barred by the 12 years period provided by article 144 of schedule II of the Limitation Act (XV of 1877) Article 44 schedule II of the same Act was not applicable as the sale was made not by a guardian but by an unauthorized person

APPEAL from a judgement and decree (7th August 1907) of the Court of the Judicial Commissioner of Oudh, which varied the decree (9th March 1907) of the District Judge of Lucknow, the latter decree having affirmed the decree (28th May 1906) of the Subordinate Judge of Lucknow

The suit out of which this appeal arose was brought by the respondent for the redemption of a one fourth share of a

Present :—Lord MACNAGHTEN Lord ROBSON Sir JOHN EDGE and Mr AMEER ALI

1911

MATA DIN v AHMAD ALI

mortgage of a village called Kabirpur, dated the 2nd of December 1885 The appellant (the defendant) was in possession of the mortgaged property under a deed of sale, dated the 15th of June 1889, at which date the plaintiff was a minor

The main question for decision on this appeal was whether the plaintiff was or was not bound by the deed of sale All three Courts in India held that he was not so bound and consequently was entitled to succeed in his suit

The facts giving rise to the litigation were that one Amir Haidar, a Muhammadan possessed of considerable property, including the village of Kabirpur, died on the 12th of August 1887 leaving a will, dated the 7th of December 1886, the provisions of which, so far as they are material for the purpose of this report, were as follows —

'In respect of taluqa Gauria the following conditions will be observed—My four grandsons i e Majid Husain Ashraf Husain Muhammad Ali and Ahmad Ali will be the owners and possessors of the taluqa in equal shares after me and will manage it in union The *sanad* of the taluqa shall be in the name of my eldest grandson Majid Husain After him in the name of every eldest in order of succession and the same order will continue in the family After deducting the *lambardars* dues and proper and necessary expenses (which will be incurred in consultation of the four grandsons) the total profits and other entire incomes of *mal* and *sewai* will be divided equally If the other grandsons make a request to the holder of the *sanad* for the partition then it will be incumbent on him to divide (the property) in equal shares in spite of the *sanad*

After devising the village of Dhakwa, an incumbrance on which was to be discharged by the four grandsons, to the testator's daughter, the will proceeded in paragraph 3 —

Besides the property specified and detailed above, my four grandsons will be owners in equal shares of the property which is mine or which I may or will acquire

Then after making provision for future expenses to be borne by the property the will concluded (paragraphs 8 and 9) —

8 My four grandsons will divide equally among themselves with the exception of the aforesaid village Dhakwa all the single villages and detached plots of lands which I took under mortgage and purchase in the fictitious names of my grandsons and all the houses.

9 The burden of the whole debt which may be found due from me after my death will be on my entire property movable and immovable excepting the village Dhakwa and my four grandsons will be responsible for its liquidation.

At the testator's death he left property of about the value of Rs 7,000 a year and debts amounting to about Rs 30,000

and the sale of Kabirpur to the defendant was for purpose of liquidating these debts

The grandsons named in the will were the children of a son who predeceased the testator, and the present respondent Ahmad Ali, the youngest of them, was about 12 years old when the testator died They formed one household, and enjoyed and managed the property jointly, the lands being registered in their joint names on their grandfather's death No guardian was appointed for the minor brother

The appellant was one of the creditors of the estate in whose favour the testator had executed the mortgage of fifteen sixteenths of the village of Kabirpur on the 2nd of December 1885 for Rs 13,000 and another mortgage of one fourth of a village called Karora for Rs 3,000 on the 7th of August 1886 The terms of these two mortgages were ten and seven years respectively There was also due to the appellant on another account a sum which on the 7th of January 1889 amounted to Rs 2,000 By a deed executed on that date by the grandsons who had attained majority, of whom one Ashraf Husain signed it for the respondent as well as for himself, the Rs 2,000 balance was made a further charge on the property comprised in the mortgage of the 2nd of December 1885 On the village Karora arrears of revenue to the extent of Rs 412 accrued and was paid by the appellant Under the circumstances it appeared to be preferable to sell a portion of the property and pay off the mortgages rather than keep them up Accordingly an agreement was made with the appellant that he should buy Kabirpur in consideration of the debts secured thereon and on Karora together with the sum of Rs 412 and a small sum in cash altogether amounting to Rs 18,500 This transaction was carried out by the deed of the 15th of June 1889, which was executed in the same manner as that of the 7th of January The three mortgage deeds were returned and the appellant thereupon became possessed of the village of Kabirpur as owner

The plaintiff (respondent) came of age in 1893, but it was not until September 1905 that, treating the mortgage of 1885 as still existing to the extent of his one fourth share, he offered the appellant the sum of Rs 4,500 for the redemption of his share,

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and on the appellant refusing to accept it, the suit out of which the present appeal arose was instituted on the 14th of September 1905, the plaintiff claiming to redeem the mortgage on Kabirpur to the extent of his one fourth share

The defence appears from the issues, which were (1) Is the plaintiff bound by the sale-deed, dated the 15th of June 1889? (2) Is the claim for redemption barred by limitation? (3) Is the plaintiff bound by the sale deed, dated the 15th of June, 1889? (4) Is the plaintiff estopped from questioning the acts of Ashraf Husain relating to the property in suit? (5) Did the plaintiff make a legal tender on 11th September, 1905?

The Subordinate Judge decided the first, third and fourth issues in favour of the plaintiff, and on the second issue he found that sum payable by the plaintiff on redemption was Rs 2,795

On appeal by the defendant the District Judge affirmed the decision of the Subordinate Judge He was of opinion that the grandsons were not appointed by the will either executors or guardians, and that assuming the adult grandsons could be considered executors it would still be incumbent on the defendant to show that the sale of the minor's share was made for his interest and for necessity On this point he found, in accordance with the opinion of the Subordinate Judge, that although the brothers may have acted in perfect good faith it was not shown that the sale was inevitable or that the course adopted was the best and most beneficial The District Judge further held that apart from the will the plaintiff could not be bound by his brothers' acts and that the deed of sale being a nullity as far as his interest was concerned no question of ratification or acquiescence arose Finally he was of opinion that the suit was not barred by limitation

The defendant then appealed to the Court of the Judicial Commissioner and the appeal was heard by MR E CHAMIER, Judicial Commissioner, and MR R GREEVEN, 2nd Additional Judicial Commissioner, who held that the fact of the brothers living in commensality like the members of a joint Hindu family was immaterial, that a *de facto* guardian of a Muhammadan minor cannot sell the minor's interest, and that under the

will the adult grandsons were not appointed executors or testamentary guardians They were further of opinion that the transaction did not admit of being ratified, and on the question of limitation that the suit was not barred

The judgement of the Court of the Judicial Commissioner will be found in the report of the case before that Court in (1908) 11 Oudh Cases, 1

On this appeal —

Kenworthy Brown and *A P Sen* for the appellant referring to the certificate of appeal granted by the Judicial Commissioner s Court on the ground that a question of law of public importance was raised namely, " whether the transfer of a Muhammadan minor s property by a person who was not his natural guardian but who was *de facto* his guardian should be upheld if made to discharge a debt payable by the minor," contended that in the circumstances of the case the executants of the deed of 15th June 1889, had power both under the will and under the Muhammadan law to sell the village Kabirpur including the respondent's interest therein The respondent's brothers were, it was submitted, executors under the will, and were thereby appointed to be his guardians, and were his natural guardians and his guardians *de facto* As to the powers of persons in that position the will showed that the estate was to be administered by the adult brothers see Probate and Administration Act (V of 1881), sections 3 and 7, and *In the goods of Russell* (1), and as to the power of an executor reference was made to *In the goods of Indra Chandra Singh, Sarasati Dasi* v *Administrator General of Bengal* (2), and the Probate and Administration Act (V of 1881, as amended by Act VI of 1889), section 90 As to the Muhammadan law on the powers of guardians reference was made to Ameer Ali's Muhammadan law (Ed 1894) Vol I, page 556, Baillie's Muhammadan law, page 632, Shama Charan Sarkar's Muhammadan law, page 90 [Lord MACNAGHTEN What is a *de facto* guardian?] A person who is in the position of a guardian, whether or not he is legally so in this case a person who has care of the property of a minor though without any special authority See *Hari Saran Moitra* v

(1) (1892) L R P D 380 (2) (1896) I L R., 23 Calc., 580

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Bhubaneswari Debi (1) as to the power of a Hindu widow as natural guardian of her adopted son though not appointed guardian, and unauthorized by the Court to act on his behalf As to the Muhammadan law the recent Calcutta and Allahabad cases were in favour of the appellant's contention Reference was made to *Mafazzal Hosain* v *Basid Sheikh* (2), *Ram Charan Sanyal* v *Anukul Chandra Acharjya* (3), *Majidan* v *Ram Narain* (4), *Hasan Ali* v *Mehdi Husain* (5), and Ameer Ali's Muhammadan law (Ed 1884), Vol II, p 496, *Hamir Singh* v *Zakia* (6) which is against the appellant, *Harbai* v *Hiraji Byramji Shanja* (7), the appellant contends here that the sale was for the respondent's benefit [Lord MACNAGHTEN referred to *Baba* v *Shivappa* (8) and *Sita Ram* v *Amir Begam* (9)] It was submitted that the respondent's brothers having taken the property under the will had power to sell and pay creditors, as Sargent, C J, said the mother in the case of *Baba* v *Shivappa* might have done as executors they can under Muhammadan law take care of the interests of a minor *Abdul Khader* v *Chidambaram Chettiyar* (10)

As to limitation, Ahmad Ali attained his majority in 1892, and the suit was not brought until September 1905 The suit was barred therefore both under article 44 and article 144 of the Limitation Act (XV of 1877)

DeGruyther, K C and *B Dube* for the respondent contended that by the Muhammadan law the sale of the 15th of June 1889 was *ab initio* void so far as the respondent's interest was concerned, and conveyed no title to the appellant Reference was made to *Bukshan* v *Maldai Kooeri* (11), where it was held that sale of a minor's property was only permissible in urgent cases, and with clear advantage to the minor, and that an elder brother was not in the position of a guardian, and had no power as such over the property of the minor members of the family *Moyna*

(1) (1888) I L R 16 Calc., 40 (55) L R 15 I A 195(202)
(2) (1906) I L R 34 Calc 36
(3) (1906) I L R 34 Calc; 65 (67 bottom of page)
(4) (1903) I L R 26 All., 22
(5) (1877) I L R., 1 All., 533
(6) (1875) I L R 1 All 57
(7) (1895) I L R 20 Bom., 116
(8) (1895) I L R 20 Bom. 199
(9) (1886) I L R 8 All., 324, (333)
(10) (1908) I L R., 32 Mad 276
(11) (1869) 3 B L R., A C., 423

Bibi v *Banku Bihari* (1), *Bhutnath Dey* v *Ahmed Hossain* (2), *Nizam-ud-din Shah* v *Ananda Prasad* (3), *Mafazzal Hosain* v *Basid Sheikh* (4) The general effect of the cases was that a person who assumes authority is held to have no power to deal with the property of a minor, but in cases where he has acted for the benefit of the minor the transaction has been allowed to stand In the present case the sale was not for the benefit of the minor *Ruttun* v *Dhoomee Khan* (5), *Majidan* v *Ram Narain* (6) where former Allahabad cases are referred to and distinguished, *Pathummabi* v *Vittil Ummachabi* (7), *Durgazi Row* v *Fakeer Sahib* (8), *Baba* v *Shivappa* (9) and *Amba Shankar* v *Ganga Singh* (10) If the sale cannot be justified under the Muhammadan law, it cannot be justified on the ground of necessity It was altogether void

As to limitation, the mortgage could not have been redeemed until 1895, and the suit having been brought within 12 years from that date was not barred

Kenworthy Brown replied distinguishing the cases of *Nizam ud din Shah* v *Ananda Prasad* (3) and *Pathummabi* v *Vithil Ummachabi* (7)

1912, *January* 16*th* —The judgement of their Lordships was delivered by Lord ROBSON —

In this case the appellant has been unsuccessful, first, before the Subordinate Judge at Lucknow, next before the District Judge of Lucknow, and lastly before the Court of the Judicial Commissioner of Oudh The Court of the Judicial Commissioner granted a certificate for an appeal to their Lordships' Board on the ground that the case raised a question of law as to whether the transfer of a Muhammadan minor's property by a person who was not his natural guardian should be upheld, if made to discharge a debt payable by the minor

The facts of the case are these —

Sheikh Ahmad Ali, the respondent, was the grandson of Amir Haidar, who, in his life time, was possessed of two villages,

(1) (1902) I L R 29 Calc 473
(2) (1885) I L R 11 Calc 417
(3) (1896) I L R 18 All 373
(4) (1906) I L R 34 Calc 36(40)
(5) (1868) 3 Agra 21
(6) (1896) I L R 26 All 92
(7) (1902) I L R 26 Mad 734
(8) (1906) I L R 30 Mad 197
(9) (1895) I L R, 20 Bom 199
(10) (1905) 9 Oudh Cases 97 (99)

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Kabirpur and Karora Amir Haidar mortgaged a 15 anna share in Kabirpur to the defendant appellant on the 2nd December 1885, and on the 7th of August 1886 he executed another mortgage in favour of the same creditor of a 4 anna share in Karora The mortgages provided that the mortgagee should take, (and he duly took) immediate possession of the mortgaged property for the purpose of realizing the agreed interest out of the annual profits, making over the surplus, if any, to the mortgagor The terms of the said mortgages were for ten and seven years respectively

Amir Haidar died on the 12th of August 1887, leaving a will, dated the 7th of December 1886, by which he bequeathed his entire estate to his four grandsons equally The plaintiff was about 12 years old when his grandfather died Afterwards, on the 15th of June 1889, the three elder grandsons, on their own behalf, and one of them, Ashraf Husain, purporting to act also as the guardian of the plaintiff, sold the village at Kabirpur to the appellant in consideration of the discharge by him of the debts secured thereon and on Karora, together with certain other smaller sums making up a total of Rs 18,500 The effect of this sale, if held good was that the plaintiff lost his interest altogether in the village of Kabirpur which was the larger and more important property, while the smaller village Karora was thenceforth free of the mortgage

The plaintiff on attaining his majority in 1892 or 1893 made no attempt to impeach this transaction, though he knew of it, but in September 1905 he tendered to the defendant the amount of mortgage money necessary to redeem his share of the mortgage property and on the defendant refusing to accept it, he brought this action for redemption

He contends that the sale deed of the 15th of June 1889 is void, as against him on the ground that his brothers had no authority under the grandfather's will to act as executors or to sell his share, and that Ashraf Husain, who purported to represent him in that transaction as his guardian was not entitled so to act The appellant contends that the four grandsons were entitled to act as executors under Amir Haidar's will, but their Lordships

agree with the Courts below in finding that there is nothing in the will justifying that view

The testator left the whole of his property (with certain unimportant exceptions) to his four grandsons in equal shares, and subject to equal obligations in respect of his debts and expenses, but he did not expressly appoint any executors of his will or guardians of his minor grandchildren It was argued that an express appointment was not necessary if the testator had clearly shown by his will an intention to entrust its administration to particular individuals, but on a fair construction of this will no such intention can be gathered from it He left his property to his grandsons so that each share thereof vested at once in the devisee, subject to the obligations attaching thereto, and there appears to be no necessity for any act of an executor to complete the operations of the will No doubt the testator contemplated a partition by the grandsons themselves of the property devised to them, and in that case it would be necessary for his grandson, if still an infant, to have a guardian, but there is nothing whatever to show that he intended all or any one of the brothers to act in that capacity So far as his intention is concerned, it may well have been that if, and when, the necessity for a guardian arose, the selection should be made by the Court

The family were Muhammadans and were governed by the Muhammadan law relating to guardianship According to that law, in the absence of duly appointed testamentary guardians the care of Ahmad Ali's property would devolve first on the father and his executor, next on the paternal grandfather and his executor, and failing these, the right of nomination of a guardian would "rest in the ruling power and its administration" (Macnaghten's "Principles of Muhammadan Law," 5th Ed, page 304) The brothers had, therefore, no right whatever to act except under the authority of an appointment by the Court Both they and the appellant seem to have had that fact in their minds when they executed the deed of the 15th June 1889 effecting the sale of Ahmad Ali's share in the land, for they stipulated that if Ahmad Ali at any time brought a claim on the ground of minority, and any dispute thereby arose in respect of Mata Din's

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possession, the three elder brothers should be answerable for the same together with costs

It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a "*de facto*" guardian He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it

There has been much argument in this case in the Courts below, and before their Lordships, as to whether, according to Muhammadan law, a sale by a *de facto* guardian, if made of necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable It is not necessary to decide that question in this case To begin with, the appellant has not succeeded in showing that the disputed sale of 1889, although made for the payment of an ancestral debt, was made of necessity, or was beneficial to the minor On the contrary, the Courts below have all found on the evidence that it was unnecessary and cannot be said to have been beneficial so far as Ahmad Ali was concerned

It is next found as a fact (and their Lordships see no sufficient reason to find otherwise), that the plaintiff on coming of age never acquiesced in the transaction which he now seeks to impeach, and that there was nothing in his conduct on which the defendant's plea of estoppel could be justified against him Unless, therefore, the plaintiff's remedy is barred by the Indian Limitation Act, XV of 1877, he is now entitled to the relief prayed for, as modified by the judgement of the Court of the Judicial Commissioner

As to the plea of limitation, the appellant defendant placed reliance on articles 44 and 144 of the Indian Limitation Act, 1877

Article 44 prescribes a period of three years within which a ward, who has attained majority, may set aside a sale made by his

guardian the time running from the date of the ward's majority This provision has no application to the present case, for the sale here was effected, not by a guardian, but by a wholly unauthorized person

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Article 144 deals with immovable property not otherwise specially provided for by the Act, and prescribes a period of 12 years from the time when the possession of the defendant becomes adverse to the plaintiff In this case, the appellant was entitled under his mortgage to full possession of Kabirpur and receipt of its rents and profits for 10 years from the 2nd of December 1885 The respondent came of age on some date in 1892 or 1893 He was then certainly entitled to treat, (and by his subsequent tender of the mortgage money it is shown that he has in fact treated), the mortgage as subsisting, so far as he was concerned Under these circumstances, the possession by Mata Din of Kabirpur did not become adverse to the respondent until the 2nd of December 1895, and as this action was begun in 1905, it was well within the period of limitation

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs

Appeal dismissed

Solicitors for the appellant —*T L Wilson & Co*

Solicitors for the respondent —*Barrow, Rogers & Nevill*

J V W

RAGHO PRASAD AND OTHERS (DEFENDANTS) *v* MEWA LAL AND ANOTHER (PLAINTIFFS) *

[On appeal from the High Court at Allahabad]

P C 1911 *November* 22 1912 *January* 23

Civil Procedure Code (1882) *section* 411—*Suit for dower* in formâ pauperis *by wife against her husband and his mortgagees—Suit pending execution of decree for sale upon mortgage—Decree dismissing suit against mortgagees and making husband solely liable—Execution of decree to recover court fees due to Government—Effect of sale of mortgaged property*

The respondents obtained a decree for sale on their mortgage on the 17th of December 1895 Pending execution the wife of the mortgagor brought a suit *in formâ pauperis* against her husband and his mortgagees for dower alleging that it was a charge on the mortgaged property in priority to the mortgage lien It was found that the dower debt was not charged on the property and on the 11th of May 1897 her suit was dismissed as against the mortgagees and a money decree

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passed against her husband alone and under section 411 of the Civil Procedure Code (XIV of 1882) the amount of the court fees due to Government was made a first charge on the amount decreed Notwithstanding that the decree expressly dismissed the suit as against the mortgaged property, the Collector in order to recover the court fees in the pauper suit brought it to sale, on the 22nd of July 1899 in execution of the decree of the 11th of May 1897 and recovered just enough to satisfy them On the application of the respondents the Civil Court directed that the property should be again put up for sale in execution of the respondent s decree of the 17th of December 1895 and on the 20th of September 1902 it was purchased at that sale by the respondents who got formal possession The purchaser under the decree of the 11th of May 1897 now represented by the appellants had however then obtained possession and there was a contest for mutation of names which resulted in the revenue courts upholding the right of priority of the Government for the court fees and the possession of the appellants

Held in a suit in the civil court by the respondents to enforce their priority and for possession that they were entitled to succeed The decree of the 11th of May 1897 did not create nor purport to create any charge on the mortgaged property and the sale under it of the 22nd of July 1899 being a sale of the property of the defendant in the suit for dower to satisfy a debt of the plaintiff in that suit was without jurisdiction and passed no title to the purchaser

Appeal from a judgement and decree (2nd December 1908) of the High Court at Allahabad, which affirmed a judgement and decree (19th September 1906) of the Judge of the Court of Small Causes at Allahabad exercising the powers of a Subordinate Judge

The suit out of which this appeal arose was brought by the respondents against one Mahabir Prasad Narain Singh, since deceased and now represented by the appellants (his son, grand sons, and great grandsons) for possession of certain villages, and for declaration of their proprietary title in certain other villages, with mesne profits and interest thereon

The original owner of the property in suit, one Tufail Ali Khan, executed between 1891 and 1894 four mortgages of it in favour of the plaintiffs for sums amounting in all to Rs 15,000 Tufail Ali Khan making default in payment, the plaintiffs on the 17th of December 1895 obtained a decree for sale of the mortgaged property, but before the decree was executed Abbasi Begam, the wife of the mortgagor, instituted on the 19th of December 1896 a suit *in formâ pauperis* against her husband and the plaintiffs for sale of the property in dispute under a kabinama (deed of dower), dated the 20th of November

1862, whereby her husband contracted to pay her a prompt dower of Rs 1,00,000 and one gold mohur, and charged the amount on the property in dispute The cour found that the deed was un stamped and unregistered and therefore created no charge on the property, and dismissed the suit against the mortgagees, giving a simple money decree against Tufail Ali Khan alone In respect of the court fees payable on the plaint the decree of the court, which was dated the 11th of May 1897, contained an order made under section 411 of the Code of Civil Procedure (XIV of 1882) as follows —"*It is further ordered that* Rs 1,450 8 0, the amount of court fee due to the Government, shall be the first charge on the amount decreed and shall also be recoverable from the defendant Tufail Ali Khan" On appeal to the High Court this decree was affirmed

On the 11th of December 1897, the Collector of Allahabad on behalf of the Government applied for execution of the decree of the 11th of May 1897 to recover the court fees due to the Government under it In this application Tufail Ali Khan was named as the person against whom the decree was to be enforced, and the property sought to be attached and sold comprised the villages mortgaged to the plaintiffs The property being ancestral, *execution of the decree was transferred to the Collector* under the provisions of section 320 of the Code of Civil Procedure, 1882 The property was sold on 22nd July 1899, and was purchased by Mahabir Prasad Narain Singh for Rs 1,525 Tufail Ali Khan *thereupon applied to the Collector to set aside the sale* on the ground of irregularity and inadequacy of price Though the plaintiffs were not made parties to the application the Collector gave them notice to appear at the hearing which they did The application was rejected on the 20th of August 1899, the Collector holding that there had been no irregularity in the conduct of the sale The sale was accordingly confirmed and a certificate of sale was issued to Mahabir Prasad Narain Singh on the 19th of September 1899 Tufail Ali Khan appealed from the Collector's order of the 20th of August 1899, to the Commissioner who confirmed the sale on the 25th of October 1899,

On the 25th of November 1899, the plaintiffs applied for sale of the same property in execution of their decree the 17th of

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December 1895 Mahabir Prasad Narain Singh objected, but his objection was disallowed on the ground that it could not be entertained under section 278 of the Civil Procedure Code The execution proceedings were transferred to the Collector under section 320 of the Code

The sale in execution was held on the 20th of September 1902, and the property was purchased by the plaintiffs, the decree holders, for Rs 18,365 The sale was duly confirmed by the Collector on the 22nd of October 1902, a certificate of sale was granted to the purchasers on the 29th of October 1902 Under the previous sale, however, of the 22nd of July 1899, Mahabir Prasad Narain Singh had obtained possession of the property in dispute and his name had been entered in the revenue papers as owner The plaintiffs applied to the Assistant Collector to expunge his name and enter theirs in its stead, but the application was rejected on the 23rd of November 1903, and his order was affirmed on appeal by the Collector on the 11th of February 1904, and on revision by the Commissioner on the 30th of May 1904 An application to the Commissioner to reconsider his order was rejected on the 14th of September 1904, and on the 8th of May 1906 the plaintiffs instituted the present suit on the ground, as stated in paragraph 8 of their plaint, that "by virtue of purchase made at an auction sale held on the 22nd of July 1899, the defendant had only acquired the equity of redemption of Tufail Ali Khan, but it was extinguished on the said property being resold and purchased by the plaintiffs The defendant is in unlawful possession of the villages specified in schedule A, and as regards the village specified in schedule B, he denies the plaintiffs' right to it"

The defence was (*inter alia*) that Mahabir Prasad Narain Singh having purchased the property at a sale held to satisfy a debt of the crown, purchased it free of all incumbrances, that the whole property having thus passed to Mahabir Prasad Narain Singh on the 22nd of July 1899, the plaintiffs purchased nothing at the subsequent sale of the 20th of September 1902, and that in any case the suit was barred by the provisions of sections 13 and 244 of the Code of Civil Procedure, 1882

Issues were settled, of which the following only were material on this appeal (1) How does the plaintiffs' omission to object at the time of the sale in satisfaction of the claim of the Government for court fees and their allowing the property to be sold without offering to pay the same affect this claim? (2) Does the claim for court fees in which the property was sold take priority over the plaintiffs' mortgage? (3) How does the judgement of the Commissioner, dated the 25th of October 1899, to the effect that the sale having taken place in satisfaction of a Crown debt, it took effect against the plaintiffs' mortgage and of the said sale having been duly confirmed affect this claim? (4) How does the plaintiffs' omission to implead the defendant in their execution proceedings affect their right to have the property claimed? (5) Is the suit barred by sections 13 and 244 of the Civil Procedure Code? (8) Did the defendant purchase the property with notice of the plaintiffs' mortgage?

On issues (1) and (2) the Judge of the first court summed up his conclusions thus —

The whole question here is, what was the subject of Abbasi Begam's suit and as I have shown it was not the property mortgaged to Mewa Lal and Lachmi Narain but the one lakh and one *asharfi* decreed to Abbasi Begam against Tufail Ali Khan The latter was also liable which means any property that he possessed was liable and that property was the equity of redemption in the villages sold I therefore hold that the sale to the defendant did not extinguish the plaintiffs prior mortgages that all that he purchased was Tufail Ali Khan's equity of redemption and that having failed to redeem the property and allowed it to be sold he could not now claim to keep it as against the plaintiffs who were purchasers in a prior mortgage and that even if a claim of Government for court fee be held to be a Crown debt it did not affect the existing incumbrances upon the debtor's land. I therefore find on the first two issues for the plaintiffs This decides the third issue also

The Judge also held that the suit was not barred by either section 13 or 244 of the Civil Procedure Code, and on issue (8) that "the plaintiffs' mortgages were notified at the sale, and the defendant purchased the property with notice thereof"

He accordingly decreed the suit

On appeal by the defendants the High Court (SIR JOHN STANLEY, C J, and BANERJI, J) agreed with the lower court that the suit was not barred by sections 13 or 244 of the Civil Procedure Code and as to issues (1) and (2) they said:

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'The main contention which has been raised before us by the learned vak for the appellants is that the defendants appellants having purchased th property at a sale for the realization of court fees acquired absolute title to i discharged of any right which the plaintiffs (mortgagees) had under their mor gages or under the sale in execution of the decree obtained by them It appea to us that there is no substance in this contention The appellants purchase *pendente lite* and in effect purchased nothing as the mortgagor's equity redemption passed to the plaintiffs under the sale made to them by the cour The appeal is in fact concluded by the decision of a Full Bench of this court i the case of *Dost Muhammad Khan* v *Mani Ram* (1) The facts of that case a on all fours with those of the present It was there held that a sale subject to mortgage of property belonging to the defendant in a suit brought *in form pauperis* for the purpose of realizing the court fee payable to Government by th plaintiff does not preclude the mortgagee from bringing to sale the same pro perty in execution of a decree for sale on his mortgage In that case as here th existence of the mortgage was notified at the sale to the defendants appellant The learned Subordinate Judge in his judgement states that the plaintiffs mor gages were all notified at the sale and the defendants purchased the propert with notice thereof This is not disputed There is in addition to this the fac as we have stated that a decree for sale had already been passed and that th defendant purchased *pendente lite*'

The High Court therefore dismissed the appeal

On this appeal—

Ross and *Kenworthy Brown* for the appellants contende that the claim of the Government for the court fees took priorit over all other claims, and the appellants having purchased at sale for realization of the court fees took an absolute title t *the property discharged of all rights which the respondents (mort* gagees) had prior to the sale of the 22nd of July 1899 The fac that the respondents' mortgages were notified at the sale, or tha proceedings in execution of the respondents' decree were pendin when the sale was held, did not in any way affect the nature o the sale or the rights which passed thereunder Reference wa made to the Civil Procedure Code (Act XIV of 1882), sectio 411, and *Collector of Moradabad* v *Muhammad Daim Kha* (2), which was the law until 1907, when it was overruled by *Dos Muhammad Khan* v *Mani Ram* (3) To say, as the Hig Court says, that the appellants took nothing under their purchas was not correct Reference was made to the Transfer of Pro perty Act (IV of 1882) section 52 (relating to *lis pendens*) and

(1) (1902) I L. R., 29 All 537 (2) (1879) I. L. R., 2 All, 196
(3) (1907) I. L. R 29 All., 537

sections 86 and 89, and *Fayaz Hossain Khan* v *Prag Narain* (1) There was an outstanding interest in the property, against which the Collector was justified in pressing the claim of the Government to the court fees The appellants took that interest which was a right to redeem Section 86 of the Transfer of Property Act was not applicable Section 89 of the Act applied and under that section the equity of redemption the appellants had taken was not lost until the confirmation of the sale to the respondents in October 1902 The appellants obtained the charge of the Crown, and section 89 took away nothing that they obtained If the decree of the respondents affected the appellants they ought to have been brought on the record, and as that was not done the decree did not bind them There was no one on the record who represented the legal estate Reference was made to section 372 of the Civil Procedure Code, 1882 Where the right of the Crown and the right of the subject collide the right of the latter must give way *Commissioners of Taxation for State of New South Wales* v *Palmer* (2), *Attorney General of New South Wales* v *Curator of Intestate Estates* (3), *Attorney General* v *Leonard* (4) per CHITTY, J

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It was also contended that the respondents having taken no steps to set aside the Collector's order of the 20th of August 1899, confirming the sale by appeal or otherwise were bound by it, and had no right to maintain the present suit Reference was made to *Malkarjun* v *Narhari* (5) and Civil Procedure Code, 1882, section 311 The Collector in rejecting on the 20th of August 1899, the application by Tufail Ali Khan to set aside the sale said that "the respondents must take what steps they can to assert their rights" They took no steps

DeGruyther, *K C* and *A P Sen* for the respondents were not called upon

1912, *January* 23rd —The judgement of their Lordships was delivered by Lord MACNAGHTEN

(1) (1907) I L R., 29 All 339 L R 34 I A 102
(2) (1907) L R A C 179
(3) (1907) L R A C 519 (523)
(4) (1888) L R 28 Ch. D 622 (626)
(5) (1900) I L R 25 Bom 337 L R 27 I A. 216

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RAGHO PRASAD v. MEWA LAL

This is an appeal from a decree of the High Court at Allahabad, which affirmed a decree of the Court of Small Causes there exercising the powers of a Subordinate Judge

The suit was brought by the respondents Mewa Lal and Lachmi Narain to recover property of which they had been deprived through the intervention of a Government official who attached it and got it sold in order to satisfy a debt due to Government from somebody else

The facts are undisputed

On the 17th of December 1895, the respondents, who were mortgagees of shares in seven villages belonging to their mortgagor one Tufail Ali Khan, obtained the usual decree for sale The 17th of April 1896 was the date fixed for payment of principal, interest and costs, which amounted in all to Rs 19,290 9 6 The mortgagor made default On the 23rd of April 1896, the mortgagees applied for an order absolute The order was drawn up on the 16th of May following On the 24th of March 1897 an application was made for execution of the decree by sale of the mortgaged property, and on the 26th of April 1897 the execution case was transferred to the Collector's Court as the property was ancestral The decree came into the hands of the Sale Officer on the 8th of July 1897

In the meantime, the wife of the mortgagor brought a suit *in formâ pauperis* against her husband, Tufail Ali Khan, and the respondents, claiming from her husband a lakh of rupees under a contract of dower, and alleging that that sum was charged on the mortgaged property in priority to the mortgages, the subject of the decree of the 17th of December 1895′ On the *11th May 1897 the suit was decreed with costs against Tufail* Ali Khan, but dismissed with costs as against his mortgagees, and it was ordered that the amount of court fees which would have been paid by the plaintiff had she not been allowed to sue as pauper should be the first charge on the amount decreed to the plaintiff, and should also be recoverable from the defendant Tufail Ali Khan

The order as regards the court fees payable to Government was in accordance with the directions of section 411 of the Civil

Procedure Code, 1882, as to pauper suits That section is in the following terms —

411 If the plaintiff succeed in the suit the court shall calculate the amount of the court fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper and such amount shall be a first charge on the subject matter of the suit and shall also be recoverable by the Government from any party ordered by the decree to pay the same in the same manner as costs of suit are recoverable under this Code

There was an appeal to the High Court but it was dismissed with costs

So the respondents succeeded in preserving the priority of their incumbrances and in maintaining the decree of the 17th of December 1895 With this success all their troubles began The Collector on behalf of Government applied for and obtained execution of the decree of the 11th of May 1897, not against Tufail Ali Khan, against whom the suit was decreed but against the mortgaged property, in regard to which the suit failed That execution case was also sent to the Collector's Court It was received by the Sale Officer on the 18th of February 1898, more than six months after the receipt of the decree of the 17th of December 1895 However, the Sale Officer fixed one and the same day, the 22nd of July 1899, for sale in both cases And when the day of sale came he put the property up for sale under the decree of the 11th of May 1897, and it was sold to Rai Bahadur, the father of the appellants, for Rs 1,529, an amount just sufficient to satisfy the claim of the Government

The mortgagees' decree was returned to the Civil Court with a statement that no property was left for sale in connection with that decree In taking this course the Sale Officer, according to the opinion of the Collector, acted legally Possibly, said the Collector, he might have put the property up for sale under the mortgagees decree, "proclaiming at the same time the debt due to Government as an incumbrance to be satisfied by the purchaser," but there was no material irregularity In the Collector's opinion the authorities clearly affirmed "the principle that the Government takes precedence of all other creditors, whether or not they have a lien on the property'

At the instance of the mortgagees the Civil Court directed that the property should be put up for sale again under the

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Bacho Prasad v Mewa Lal

decree of the 17th of December 1895 Ultimately the mortgagees bought it for Rs 18,365 They obtained formal possession But it seems that Rai Bahadur had already obtained possession under his sale certificate Both parties then exerted themselves to collect rents Then followed a struggle for mutation of names The Assistant Collector dismissed an application for that purpose by the mortgagees, blaming them for trying to avoid payment of the Government dues "instead of quietly paying off" the court fees and getting the property sold in satisfaction of their large debt After a learned argument he held that the wording of section 411, Civil Procedure Code, was clear that the Government dues were the first charge on the property, and that Rai Bahadur had consequently a preferential claim Then the mortgagees appealed to the Collector He took the same view, after argument though he confessed that he "had not hitherto realized that the position of the Crown in such matters was so strong" Lastly, the mortgagees applied to the Commissioner on second appeal He, too, rejected their application, in the first instance on reading the record, and then on an application for revision after hearing the parties at considerable length, who "argued as to the equity and legal rights of the case" As to the merits he pronounced no opinion He thought it essentially a case for the Civil Court But, he added, that until the question was determined by a competent court he did "not think that any fairer decision could be come to than that at which the Collector arrived"

So at last the mortgagees betook them to the Civil Court, to which they ought to have applied long before in a regular suit The Judge of first instance ordered that the respondents should be put in possession of the property, and declared that they were the absolute owners An appeal to the High Court was dismissed with costs But the learned Judges, after argument, came to the conclusion that there was a substantial question of law involved, and gave leave to appeal to His Majesty in Council

Their Lordships are at a loss to discover what question of law is involved in this case So far as can be gathered from the judgements in the Collector's Court, the validity of the sale to Rai Bahadur was rested on two grounds (1) on the terms of

section 411 of the Civil Procedure Code, and the decree of the 11th of May 1897, and (2) on the prerogative of the Crown. As to the first point the claim put forward on behalf of the Government is absurd. The decree of the 11th of May 1897 did not create any charge on the mortgaged property in favour of the Government. The Government had no right to attach the property and sell it in execution under that decree, though, of course, such interest, if any, as remained in the mortgagor from whom the court fees were declared to be recoverable, might have been reached by a proper proceeding. The order for the first sale was, therefore, without jurisdiction. The sale passed no property to the person declared purchaser. On the second point the claim advanced by the Collector on behalf of the Government is a preposterous claim. It is only when claims of the Crown and claims of "common persons" (to use an old expression) "concur" or come into competition that the Crown is preferred. The Crown has no more right than a "common person" to seize A's property and apply it in or towards the discharge of a debt due from B. That is not a question of law. It is a matter of common justice, and it may be added, of common honesty.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitor for the appellant.—*Douglas Grant.*

Solicitors for the respondents.—*Barrow, Rogers and Nevill.*

J. V. W.

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DEBI MANGAL PRASAD SINGH (PLAINTIFF) v MAHADEO PRASAD SINGH (DEFENDANT)

[On appeal from the High Court at Allahabad]

Hindu law—Inheritance—Mitakshara law—Joint Hindu family—Mother s share on partition of joint family property between her and her sons after father s death—Stridhan—Maintenance

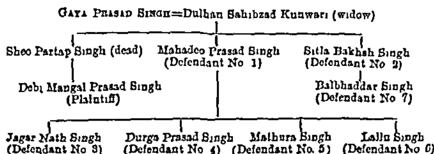
According to the Mitakshara there is no substantial difference in principle between a woman s property acquired by inheritance and that acquired by partition

Held therefore (reversing the decision of the courts in India) that the share which the mother in a joint Hindu family obtains after the death of the father on partition of the joint family property between the mother and the sons is not her *stridhan* but is given for her maintenance and on her death it devolves upon the heirs of her husband and not upon her own heirs

Debi Mangal Prasad Singh v *Mahadeo Prasad Singh* (1) and *Chhiddu* v *Naubat* (2) overruled

APPEAL from a judgement and decree (20th December 1909) of the High Court at Allahabad, which affirmed a judgement and decree (14th December 1907) of the Subordinate Judge of Gorakhpur dismissing the appellant's suit

The main question for decision on this appeal was whether property to which a Hindu mother in a joint family governed by the Mitakshara law becomes entitled on partition is her *stridhan* or not



The above pedigree shows the relationship of the parties Debi Mangal Prasad Singh the appellant (plaintiff), was the grandson, and the respondents, Mahadeo Prasad Singh (defendant No 1) and Sitla Bakhsh Singh (defendant No 2), were the sons of Gaya Prasad Singh, who died leaving a widow, Dulhan Sahibzadi Kunwari

Present :—Lord MACNAGHTEN Lord ROBSON Sir JOHN EDGE and Mr AMEER ALI

(1) (1909) I L R 32 All., 253 (2) (1901) I L R 24 All 67

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DEBI MANGAL PRASAD SINGH v. MAHADEO PRASAD SINGH

On the 4th of January 1893, the appellant being then a minor, his mother Dulhan Dharamraj Kunwari brought a suit for partition of shares in the ancestral property against the present respondents Mahadeo Prasad Singh and Sitla Bakhsh Singh To that suit Dulhan Sahibzad Kunwari was made a party defendant on her own application The First Court decreed to each of the parties to the suit a one fourth share in the property, and that decree was affirmed by the High Court Dulhan Sahibzad Kunwari thus obtained a one fourth share on partition. She died on the 19th of November 1900, and the appellant brought, on the 1st of June 1907, the suit out of which the present appeal arose to recover possession of a one third share of the property obtained by Dulhan Sahibzad Kunwari on partition on the allegation that on her death the defendants had wrongly taken possession of the whole of the property, although they were only entitled to a two thirds share in it

The defence was that the property in suit was the *stridhan* of Dulhan Sahibzad Kunwari and that the plaintiff therefore had no right of inheritance in it

Two issues were settled, namely —(1) Whether the property Dulhan Sahibzad Kunwari got under the partition decree was her own *stridhan* or she had only a life interest in it? (2) Is the plaintiff the legal heir of Dulhan Sahibzad Kunwari and has he any interest in the property left by her as against the defendants Nos 1 and 2?

The Subordinate Judge decided both issues against the plaintiff on the ground that the share allotted to Dulhan Sahibzad Kunwari on partition was her *stridhan* to which the plaintiff was not entitled under the Hindu law

On appeal the High Court (Sir JOHN STANLEY, C J, and BANERJI, J) affirmed that decision

The judgement of the High Court will be found in I L R, 32 All, 253

On this appeal—

Sir *Erle Richards, K C* and *B Dube* for the appellant contended that the share allotted on partition to Dulhan Sahibzad Kunwari was for her maintenance only, and was not her *stridhan* it therefore passed on her death to her husband's heirs and not to

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her own heirs under the Mitakshara law Reference was made to *Mayne's Hindu Law, 7th ed*, page 882, para 658, for the definition "Stridhan," see "Mitakshara," chap II, section 11, paras 2 and 30 (Stoke's Hindu Law Books, page 458) Mayne's Hindu Law, pages 820, 822, para 610, *Thakoor Deyhee v Rai Baluk Ram* (1), Macnaghten's Hindu law, Vol I, page 40, and *Bhugwandeen Doobey v Myna Baee* (2) A distinction has been drawn between property voluntarily given or inherited and that taken on partition *Chotay Lall v Chunnoo Lall* (3), *Muttu Vaduganadha Tevar v Dorasinga Tevar* (4), *Sheo Shankar Lal v Debi Sahai* (5), *Sheo Pratab Bahadur Singh v Allahabad Bank* (6), Mayne's Hindu Law, page 837, para 621, *Cossinaut Bysack v Hurrosoondry Dossee* (7) A widow would not get a larger share on partition than if she inherited as it is only for her maintenance, Guru Das Banerjee's Hindu Law, "Marriage and Stridhan" (2nd ed), page 305 *Sorolah Dossee v Bhuban Mohun Neoghy* (8) decided by Sir Arthur Wilson, *Mayne's Hindu Law*, page 703, para 518 There is an absence of authority in India on the point in the present case In Bengal the general law is that the wife's share reverts to her husband's heirs on her death as in the case decided by Sir Arthur Wilson, *Beni Parshad v Puran Chand* (9) *Chhiddu v Naubat* (10), Mitakshara, chap I, section 6 (Stoke's Hindu Law Books 394), section 3, para 8, chap II, section 1, para 30 et seqq Guru Das Banerjee's "Marriage and Stridhan" (2nd ed), 330, 331, *Sri Lal Rai v Surajbali* (11), Mitakshara, chap I, section 1 (Stoke's Hindu Law Books, 371), *Buldeo Singh v Mahabeer Singh* (12), *Sheodyal Tewaree v Judoonath Tewaree* (13) and *Laljeet Singh v Rajcoomar Singh* (14) In any event the appellant was entitled to succeed to the property together with the respondents 1 and 2

(1) (1866) 11 Moo I A 139 (655 174)
(2) (1867) 11 Moo I A 487, (504—506)
(3) (1878) I L R 4 Calc 744 (753 754) L R 6 I A 15 (30)
(4) (1881) I L R 3 Mad 290 L R 8 I A 99 (108)
(5) (1903) I L R 25 All 468 (472) L R, 31 I A 202 (205)
(6) (1903) I L R, 25 All, 476 (491) L R 30 I A 209 (217)
(7) (1820) 2 Morley's D g 198
(8) (1888) I L R 15 Calc 292
(9) (1896) I L R 23 Calc 262 (279)
(10) (1901) I L R 24 All (67 74 76)
(11) (1901) I L R 24 All, 82
(12) (1866) 1 Agra H C 155 (157)
(13) (1868) 9 W R 61 (63)
(14) (1873) 20 W R, 336 (340)

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DEBI MANGAL PRASAD SINGH v MAHADEO PRASAD SINGH

DeGruyther, *K C*, *Ross* and *A P Sen*, for the respondents contended that the share which was allotted to Dulhan Sahibzad Kunwari on partition was her *stridhan* to which the appellant had no right of inheritance The Mitakshara was the sole authority in this case, and what the Mitakshara laid down was that the mother does not take the share she is entitled to, as maintenance, but in precisely the same manner as the other sharers take their shares, Mitakshara, chap II, section 1, paras 31, 32, 33 The case supposed in the Mitakshara is a case of partition in the father's lifetime, see chapter I, section 7, paras 1 and 2, chap II, section 11, paras 1, 2 and 12 *Chotay Lall* v *Chunnoo Lall* (1), *Sheo Dayal Tewaree* v *Judoonath Tewaree* (2) was irrelevant as no partition had taken place, *Mohabeer Pershad* v *Ramyad Singh* (3) gave no conclusive decision, *Beni Parshad* v *Puran Chand* (4), *Lalljeet Singh* v *Raj Coomar Singh* (5), *Doorga Koonwar* v *Tejoo Koonwar* (6), *Nellaikumaru Chetti* v *Marakathammal* (7), *Bhagirthibai* v *Kahnujirav* (8) per WEST J, Guru Das Banerjee's Hindu Law "Marriage and Stridhan" (2nd ed), 314, 320, *Thakoor Deyhee* v *Rai Baluk Ram* (9), *Bhugwandeen Dubey* v *Myna Baee* (10), *Lal Sheo Partab Bahadur Singh* v *Allahabad Bank* (11), *Subramanian Chetti* v *Arunachelam Chetti* (12) The Bengal cases are useless here, as they are decided on the Dayabhaga law *Sorolah Dossee* v *Bhubun Mohun Neoghy*, (13) did not decide the point in the present case Mayne's Hindu Law omits consideration of the other sections of the Mitakshara referred to *Hemangini Dasi* v *Kedarnath Kundu Chowdhry* (14) The respondents, therefore, it was submitted, rightly obtained possession of the share of Dulhan Sahibzad Kunwari as her sons and heirs on her death, to the exclusion of the appellant

(1) (1878) I L R 4 Calc 744 L R 6 I A 15
(2) (1869) 9 W R 61 (62)
(3) (1873) 12 B L R 90 20 W R 192 (195)
(4) (1896) I L R 23 Calc 263 (278)
(5) (1873) 20 W R 336 (339 340)
(6) (1866) 5 W R Misc 53
(7) (1876) I L R 1 Mad 166
(8) (1886) I L R, 11 Bom, 28
(9) (1866) 11 Moo I A, 139 (15, 174)
(10) (1867) 11 Moo I A, 487 (504, 506)
(11) (1903) I L R 25 All 476 (491) L R 30 I A 209 (209 217)
(12) (1904) I L R, 28 Mad 1
(13) (1888) I L R 15 Calc, 292
(14) (1889) I L R 16 Calc 758

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Sir *Erle Richards, K C*, replied, referring to Mitakshara, chap I, section 6, para 2, section 3, para 8 and chap II, section 1, para 33

1912, *February 2nd* —The judgement of their Lordships was delivered by Lord ROBSON —

The question to be determined in this case is whether immovable property, obtained by a Hindu widow on partition of the joint family property under the Mitakshara law, is part of her *stridhan* in the narrow sense of that word, indicating her separate property or peculium which passes on her death to her own heirs, or is merely part of her *stridhan* in the wider sense in which the word is sometimes used, as indicating any property in which she may have some right of proprietorship

The property in question originally belonged to one Gaya Prasad, who, with his three sons, formed a Hindu joint family governed by the Mitakshara law He died leaving three sons and a widow, Dulhan Sahibzad Kunwari One of his sons, Sheo Partap Singh, died in 1889, leaving a widow and his son, the plaintiff appellant In 1894 a partition of the joint family property took place, at the suit of the plaintiff, under the guardianship of his mother, and in that suit the court apportioned one fourth share of the property to Dulhan Sahibzad Kunwari, who remained in possession thereof until her death on the 19th of November 1900

The plaintiff claims possession of one third of the property thus held by her, on the ground that it passed, under the Mitakshara law, to the heirs of her husband, of whom he is one

The first two defendant respondents are the two surviving sons of Dulhan Sahibzad Kunwari, and their contention is that the property acquired by their mother on the said partition was her *stridhan* or *peculium* so as to descend to her heirs

This raised the further question as to whether the plaintiff, whose father had predeceased Dulhan Sahibzad Kunwari, was one of her heirs or was excluded from her inheritance by her surviving sons The Subordinate Judge decided both these issues in favour of the defendants, and that judgement was affirmed by the High Court at Allahabad.

The sections of the Mitakshara dealing with the property of a woman have given rise to much controversy and some conflict of decisions In chap II, section 11, para 1 of that treatise, Vijnanesvara sets forth Yajnyawalcya's classification or description of woman's property as follows —

What was given to a woman by the father the mother the husband or a brother or received by her at the nuptial fire or presented to her on her husband s marriage to another wife as also any other [separate acquisition] is denominated a woman s property

In para 2 of the same section, Vijnanesvara repeats in substance the six fold classification given in para 11, and then in place of the general words "as also any other" he substitutes a further enumeration as follows —

And also property which she may have acquired by inheritance purchase partition seizure or finding are denominated by Manu and the rest woman s property

This reference to Manu is not borne out by the quotation from that authority given in para 4 (section 1) Manu is there cited as making the same classification of the different kinds of "woman's property" as that above given by Yajnya walcya, and saying that they "are denominated the six fold property of a woman"

The six fold enumeration of the sources of a "woman's property," as given by Yajnyawalcya and Manu, corresponds with the technical or narrow signification of *stridhan* indicating property which is under her absolute control during life on her death is descendible to her heirs Do the same characteristics attach to a woman's property derived from the additional sources specified by Vijnanesvara, viz, inheritance, partition, &c? The words "any other" with which Yajnyawalcya concluded his enumeration are a translation of the word "adi" or "adya," which, according to Mr Mayne (Hindu Law, 7th ed, page 823) means "and the like" In that view, Yajnyawalcya meant to limit his description of "woman's property," or *stridhan*, to property acquired in any of the six modes he had just specified, or in any other manner *ejusdem generis* with those modes Vijnanesvara's additional enumeration goes beyond that When read with Yajnyawalcya's description, it constitutes a practically complete statement of the means by which a woman can acquire property rights Dealing with this extended signification of the

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DEBI MANGAL PRASAD SINGH v. MAHADEO PRASAD SINGH.

term "woman's property" Vijnanesvara says in paragraph 3 of the same section that it "conforms in its import with its etymology and is not technical." In paragraphs 2, 3 and 4, therefore, he is speaking of *stridhan* in the wider sense. In paragraphs 5, 6 and 7, Vijnanesvara cites the description of "woman's property" given by Katyayana, which does not expressly profess to be exhaustive, but which closely approximates in character to that given by Yajnyawalcya and Manu, and does not include any of the heads (inheritance, partition, &c.) added to the list by Vijnanesvara in paragraph 2. Then comes paragraph 8, which gives rise to the difficulty. It runs thus:—"A woman's property has been thus described. The author next propounds the distribution of it. 'Her kinsmen take it if she die without issue.'"

The rule of devolution prescribed by the author (Yajnyawalcya) to whom Vijnanesvara refers, was, so far as that author himself was concerned, no doubt intended to apply only to *stridhan* in the narrow signification defined in paragraph 1, and not to the enumeration as expanded by the commentator in the concluding words of paragraph 2. It is, indeed, possible to read paragraph 3 as applying only to the more limited enumeration of Yajnyawalcya. When Vijnanesvara says "a woman's property has been thus described,' he may have been referring to the description given by his author and by Katyayana, and have intended to confine Yajnyawalcya's rule of devolution to Yajnyawalcya's classification. His language, however, in paragraph 8, when read with what he says in paragraphs 2, 3 and 4, is open to the meaning that a woman's property, of whatsoever kind, descends always to her own heirs. It is difficult to adopt the latter construction in view of the undoubted fact that, as Sir Arthur Wilson said in delivering the judgement of their Lordships' Board in *Sheo Shankar Lal* v. *Debi Sahai* (1), "most of the old commentators recognize, with regard to the property of a woman, whether called *stridhan* or by any other name, that there may be room for differences in its line of descent according to the mode of its acquisition."

So far as woman's acquisition of property by inheritance is concerned the matter is now clearly concluded by authority, and

(1) (1903) I. L. R., 25 All., 468 (472): L. R., 30 I. A., 202 (206).

a consideration of the cases decided with regard to that item in Vijnanesvara's additional enumeration will facilitate the task of dealing with the item of "partition" in the same enumeration

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Debi Mangal Prasad Singh v Mahadeo Prasad Singh

In the case of *Thakoor Deyhee v Rai Baluk Ram* (1) it was contended that, in the provinces governed by the Mitakshara, the widow's estate in her husband's property was absolute and that she had full power to dispose of it In support of that argument reliance was placed on the concluding words of the second paragraph of section 11, chap 2, of the Mitakshara above dealt with, viz., "also property which she may have acquired by inheritance" Their Lordships, however, rejected the view that those words included such property as part of a woman's *stridhan* so as to make it descendible to her heirs They quoted, with approval, the proposition laid down by Sir William Macnaghten in his "Principles and Precedents of Hindu Law," vol 1, page 38, where he says —

> In the Mitakshara whatever a woman may have acquired whether by inheritance, purchase partition seizure or finding is denominated woman's property but it does not constitute her *peculium* '

It was therefore held that a widow has no power of alienating any immovable property which she has inherited from her husband, and that, on her death, such property will pass to the next heirs of her deceased husband Similarly, in *Bhugwandeen Doobey* v *Myna Baee* (3) it was held that, by the Hindu law prevailing in Benares (the Western School), no part of the husband's estate, movable or immovable, forms portion of his widow's *stridhan*, and she has no power to alienate the estate inherited from her husband, to the prejudice of his heirs, which, at her death, devolves on them Sir JAMES COLVILLE, in delivering the judgement of their Lordships' Board, says —"Both the Vivada Chintamani and the Mayukha confine *stridhan* within the definitions of Manu and Katyayana They exclude property inherited, and the other acquisitions which are comprehended in the last clause of the paragraph in the Mitakshara, but are excluded by Sir William Macnaghten"

This observation puts partition on the same footing as inheritance, so far as the rights of a widow are concerned

(1) (1863) 11 Moo I A, 139 (2) (1867) 11 Moo I A., 487

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In *Chotay Lall* v *Chunnoo Lall* (1) it was held that, under the law of Mitakshara, a daughter's estate inherited from the father is a limited and restricted estate only and not *stridhan*, so that upon her death the next heirs of the father succeed thereto

The cases on the question of a woman's inherited property came under review by their Lordships' Board in *Sheo Shankar Lal* v *Debi Sahai* (2) before referred to and *Lal Sheo Partab Bahadur Singh* v *Allahabad Bank* (3) The construction of the Mitakshara was again considered, and it was held that, under the Hindu law of the Benares school, property which a woman has taken by inheritance from a female is not her *stridhan* in such sense that on her death it passes to her *stridhan* heirs in the female line to the exclusion of males

Each of these authorities is inconsistent with the wide scope which the respondents, on their construction of the Mitakshara, seek to give to the definition of *stridhan*

The question now arises whether there is any substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition It is a question attended with some difficulties, especially in the construction of the Mitakshara, whatever view of it may be taken While a family remains joint a woman has no right under the Mitakshara for a specific share of the family estate She is only entitled to maintenance, or in due course to her customary inheritance, and if a partition takes place a mother gets a share equal to that of a son If the share given to a widow on partition is given to her as a substitute for that to which she would be entitled upon inheritance, then, according to the foregoing authorities, it would seem reasonable that it should follow the same rule of descent and revert on her death to her husband's heirs If, on the other hand, it is given to her by way of provision for her maintenance, it seems equally reasonable that when the necessity for her maintenance has ceased the property should revert to the estate from which it was taken Of course, the members of a joint family effecting a partition may agree that a portion of the property shall be transferred to the widow by way of absolute gift,

(1) (1878) I L R 4 Calc 744 L R 6 I A 15
(2) (1903) I L R 25 All 468 L R 30 I A 202
(3) (1903) I L R 25 All 476 L R, 30 I A 209

as part of her *stridhan*, so as to constitute a provision for her *stridhan* heirs, but, in the absence of any such intention, their Lordships do not feel justified in putting property acquired by a widow, on a partition of the joint estate, upon a footing different *from that on which property coming to her by way of inheritance* has been placed The contrary view was taken by the High Court at Allahabad in *Chhiddu* v *Naubat* (1) The learned Judges in that case laid great stress upon chap I, section 6, para 2 of the Mitakshara Vijnaneswara there deals with the rights of a son born after the partition, and says that on the demise of his parents he obtains both their portions,—

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His mother's portion however only if there be no daughter for it is declared that Daughters share the residue of their mother's property after payment of her debts. '

Again chap I, section 3, para 8, runs as follows —

It has been declared that sons may part the effects after the death of their father and mother The author states an exception in regard to the mother's separate property The daughters share the residue of their mother's property after payment of her debts '

This paragraph refers only to the mother's separate property or *peculium* whatever that may be But it is by no means certain either in that paragraph or in section 6, paragraph 2, the property coming to her by way of partition is necessarily included in that *peculium*

That there is a distinction in the rules of descent between different kinds of a woman's property, according to the mode in which it has been acquired, is beyond question, but the Mitakshara does not always discriminate between these different kinds of property, and in the doubt that arises as to its precise intent and construction in reference to this point, the principle upon which the cases relating to inheritance have been decided appears to be safe guide in dealing also with cases of partition

In this view, it is unnecessary to discuss the second question as to whether the plaintiff was entitled to share in his grand mother's estate as one of her heirs equally with his uncles

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, the decrees of the Courts below set aside with costs, and in lieu thereof a decree made in

(1) (1901) I L R 24 All, 67 (74, 76)

1911

DEBI MANGAL PRASAD SINGH v MAHADEO PRASAD SINGH

favour of the appellant for the one third of the share with mesne profits which came to Dulhan Sahibzad Kunwari on partition and was held by her

The respondents will pay the costs of the appeal

Appeal allowed

Solicitors for the appellant —*Barrow, Rogers and Nevill*

Solicitors for the respondents —*T L Wilson & Co*

J V W

1911
November 29

REVISIONAL CRIMINAL

Before the Hon'ble Mr H G Richards Chief Justice

EMPEROR v LAL SINGH*

Criminal Procedure Code, section 407—Sanction to prosecute—Application to Magistrate of the first class—Appeal to District Magistrate—Transfer—Jurisdiction

Section 407 of the Criminal Procedure Code does not entitle a District Magistrate to send appeals under section 195 of that Code to a Magistrate of the first class subordinate to him. That section deals with appeals from convictions *Sadhu Lall* v *Ram Churn Pasi* (1) followed

THIS was an application in revision arising out of an application for sanction to prosecute The original application was made more than three months after the decision of the case from which it arose The Magistrate, who originally heard the case, had been transferred in the mean time The successor of the Magistrate granted sanction The opposite party appealed under section 195 of the Code of Criminal Procedure to the District Magistrate, who transferred the appeal to a Magistrate of the first class subordinate to him

The appeal was dismissed and thereupon the opposite party applied in revision to the High Court

Mr *C Dillon* (with him Babu *Balram Chandra Mukerji*), for the applicant, contended that the application for sanction was made more than three months after the case was over The other party waited till the officer who decided the case went away on leave Under such circumstances sanction should not have been granted

* Criminal Revision No 614 of 1911 from an order of Kasim Beg Chagtai Magistrate first class of Budaun dated the 11th of October 1911

(1) (1903) I. L. R 30 Calc 394

1911

EMPEROR v LAL SINGH

The Collector had no jurisdiction to transfer the appeal to another Magistrate He referred to *Sidhu Lal* v *Ram Churn Pasi* (1)

The Hon'ble Pandit *Moti Lal Nehru*, for opposite party, was heard in reply

RICHARDS, C J —This is an application to set aside the orders of two Magistrates of the first class, granting sanction to prosecute under sections 193 and 211 of the Indian Penal Code The application for sanction was not made before the same Magistrate as had originally tried the case but it was made to his successor, who granted sanction There was an appeal to the District Magistrate who apparently directed that the appeal should be heard by another Magistrate of the first class subordinate to him The learned District Magistrate was evidently exercising what he considered to be the power vested in him under section 407 In my opinion this section does not entitle the District Magistrate to send appeals under section 195 of the Criminal Procedure Code to a Magistrate of the first class subordinate to him The section deals with appeals from convictions This view of the section was taken in the case of *Sadhu Lall* v *Ram Churn Pasi* (1) I therefore allow the application, set aside the order of Mr Kasim Beg Chagtai, and send back the case to the District Magistrate with directions that he should hear the appeal himself I expressly abstain from stating any view upon the merits

(1) (1903) I L R 30 Calc 394

1911
December 16

APPELLATE CIVIL

Before Mr Justice Karamat Husain and Mr Justice Chamier

LACHMI NARAIN (DEFENDANT) v TURAB UN NISSA (PLAINTIFF)*

Act No IX of 1908 (*Indian Limitation Act*) *schedule I, articles* 116 120 131 132—*Suit to recover arrears of annuity charged on immovable property —Claim for personal decree only—Limitation*

Held that article 132 of the first schedule to the Indian Limitation Act is applicable only to suits in which the plaintiff claims to recover money charged upon immovable property to raise it out of that property and not to a claim in which merely personal decree is asked for *Ramdin* v *Kalka Prasad* (1) followed

Held also that the words of article 131 ' to establish a periodically recurring right are altogether inapplicable to a suit to recover arrears of payments due under a registered contract *Dost Muhammad Khan* v *Sohan Singh* (2) followed. A suit of such a nature is governed by either article 116 or article 120 of the first schedule to the Indian Limitation Act

THE facts out of which this appeal arose were as follows

In February, 1866, one Maujud Ali Shah executed a document, whereby, after reciting that a large sum of money was due to his wife on account of dower, he undertook to pay her Rs 12 per mensem during her life, and agreed she should receive that amount out of the income of certain immovable property In 1870, he mortgaged that and other immovable property to Lachman Singh and Madho Singh for Rs 22,700, by a deed which provided that the mortgagees should pay anually out of the profits of the property for the illumination of the *dargah* of which he was *sajjada nashin*, and that, of this sum, Rs 12 a month should be paid to his wife, Abadi Begam, and the remaining Rs 13 a month were to be paid to him In August, 1874, the mortgagees sub mortgaged their rights to Asa Ram, the father of the defendant to the present suit The original mortgagees and after them Asa Ram continued to pay the money to Abadi Begam an dMaujud Ali Shah and their heirs until 1898 or 1899, when Asa Ram stopped payment In the present suit, instituted in 1909, the plaintiff respondent claimed arrears of the sums of Rs 12 and Rs 13 per mensem, from 1899 to the date of suit, and

* Second Appeal No 1303 of 1910 from a decree of Mohammad Ishaq Khan District Judge of Farrukhabad dated the 12th of September 1910 confirming a decree of Daya Nath Subordinate Judge of Farrukhabad dated the 16th of December, 1909

(1) (1885) I. L. R. 7 All. 502 (2) Punj Rec 1906 p 303

interest thereon at the rate of 6 per cent per annum The court of first instance decreed the claim, and this decree was affirmed in appeal by the District Judge The defendant appealed to the High Court

Mr *W K Porter* (for Mr *B E O'Conor*) and Munshi *Gulzari Lal*, for the appellant

Dr *Tej Bahadur Sapru* (with him Dr *Satish Chandra Banerji*) for the respondent

KARAMAT HUSAIN and CHAMIER, JJ —In February, 1866, one Maujud Ali Shah executed a document whereby, after reciting that a large sum of money was due to his wife on account of dower, he undertook to pay her Rs 12 per mensem during her life and agreed that she should receive that amount out of the income of certain immovable property In 1870, he mortgaged that and other immovable property to Lachman Singh and Madho Singh for Rs 22,700, by a deed which provided that the mortgagees should pay annually out of the profits of the property for the illumination of the *dargah* of which he was *sajjada nashin*, and that, of this sum, Rs 12 a month should be paid to his wife, Abadi Begam, and the remaining Rs 13 a month were to be paid to him In August, 1874, the mortgagees sub mortgaged their rights to Asa Ram, the father of the defendant to the present suit The original mortgagees and after them Asa Ram continued to pay the money to Abadi Begam and Maujud Ali Shah and their heirs until 1898 or 1899, when Asa Ram stopped payment In the present suit, instituted in 1909, the plaintiff respondent claims arrears of the sums of Rs 12 and Rs 13 per mensem, from 1899 to the date of suit, and interest thereon, at the rate of 6 per cent per annum The courts below have decreed the claim The questions for decision in this appeal are, whether the suit is within time, and whether the plaintiff has established her title to recover the amount claimed On the question of limitation the courts below have held that the claim is governed by article 132 of the first schedule of the Limitation Act But that article, as held by their Lordships of the Privy Council in *Ram Din* v *Kalka Prasad* (1), is applicable only to suits in which the plaintiff claims to recover money charged upon immovable property to

(1) (1885) I. L R , 7 All. 502

1911
December 16

APPELLATE CIVIL

Before Mr Justice Karamat Husain and Mr Justice Chamier

LACHMI NARAIN (DEFENDANT) *v* TURAB UN NISSA (PLAINTIFF)*

Act No IX of 1908 (Indian Limitation Act) schedule I articles 116 120, 131 132—Suit to recover arrears of annuity charged on immovable property —Claim for personal decree only—Limitation

Held that article 132 of the first schedule to the Indian Limitation Act is applicable only to suits in which the plaintiff claims to recover money charged upon immovable property to raise it out of that property and not to a claim in which merely personal decree is asked for *Ramdin* v *Kalka Prasad* (1) followed

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(1) (1885) I. L R. 7 All. 502 (2) Punj Rec. 1906 p 503

interest thereon at the rate of 6 per cent per annum The court of first instance decreed the claim, and this decree was affirmed in appeal by the District Judge The defendant appealed to the High Court

Mr *W K Porter* (for Mr *B E O'Conor*) and Munshi *Gulzari Lal*, for the appellant

Dr *Tej Bahadur Sapru* (with him Dr *Satish Chandra Banerji*) for the respondent

KARAMAT HUSAIN and CHAMIER, JJ —In February, 1866, one Maujud Ali Shah executed a document whereby, after reciting that a large sum of money was due to his wife on account of dower, he undertook to pay her Rs 12 per mensem during her life and agreed that she should receive that amount out of the income of certain immovable property In 1870, he mortgaged that and other immovable property to Lachman Singh and Madho Singh for Rs 22,700, by a deed which provided that the mortgagees should pay annually out of the profits of the property for the illumination of the *dargah* of which he was *sajjada nashin*, and that, of this sum, Rs 12 a month should be paid to his wife, Abadi Begam, and the remaining Rs 13 a month were to be paid to him In August, 1874, the mortgagees sub mortgaged their rights to Asa Ram, the father of the defendant to the present suit The original mortgagees and after them Asa Ram continued to pay the money to Abadi Begam and Maujud Ali Shah and their heirs until 1893 or 1899, when Asa Ram stopped payment In the present suit, instituted in 1909, the plaintiff respondent claims arrears of the sums of Rs 12 and Rs 13 per mensem, from 1899 to the date of suit, and interest thereon, at the rate of 6 per cent per annum The courts below have decreed the claim The questions for decision in this appeal are, whether the suit is within time, and whether the plaintiff has established her title to recover the amount claimed On the question of limitation the courts below have held that the claim is governed by article 132 of the first schedule of the Limitation Act But that article, as held by their Lordships of the Privy Council in *Ram Din* v *Kalka Prasad* (1), is applicable only to suits in which the plaintiff claims to recover money charged upon immovable property to

(1) (1885) I L R 7 All 502

1911

Lachmi Narain v Turab un Nissa

raise it out of that property In the present case the plaintiff claims only a personal decree against the defendant She does not seek to recover the money out of the property In this Court it has been contended that if article 132 does not apply, then the proper article to apply is article 131, and two cases decided by the Madras High Court (1) have been referred to in which it has been held that the words "to establish" in article 131 are not confined to a declaration of title but include the recovery of arrears due to the plaintiff in respect of a periodically recurring right The Punjab Chief Court, on the other hand, in *Dost Muhammad Khan* v *Sohan Singh* (2), have held that the words "to establish" in article 131 do not extend and cannot be extended to cases in which the plaintiff seeks to recover specific sums of money due to him in respect of a recurring right We prefer the view taken by the Punjab Chief Court It seems to us that the language of article 131 "to establish a periodically recurring right" is altogether inapplicable to a suit to recover arrears of payment due under a registered contract such as we have in the present case We are of opinion that the suit is governed either by article 116 or article 120, and that in either case no more than six years' arrears or a sum equivalent thereto can be recovered There remains the question whether the plaintiff has established a right to recover any sum under the deed The defendant pleaded that the plaintiff was not entitled to sue as she could not be appointed *mutawalli* of the shrine, and that only a lawfully appointed *mutawalli* could recover it, and that the money payable under the deed had nothing to do with the inheritance It is quite clear that the income of the mortgaged property could not be constituted *waqf*, and there is no indication whatever that the *corpus* of the property has been constituted *waqf* It seems to us that it is no answer to the plaintiff's claim to say that she is not a *sajjada nashin* or *mutawalli* of the property She is entitled to recover on the deed, if she can show that she is the heir of Maqsud Ali Shah who died in 1899 The plaintiff propounded a pedigree according to which she is clearly the next heir of Maqsud Ali Shah The defendant pleaded that

(1) *Ramasami Zamindar* v *Dorasami* (1884) I L R 7 Mad. 341 343 and *Ratnamasari* v *Akilandammal* (1903) I. L. R 26 Mad, 291 314

(2) Punj Rec 1906 p 303

1911

LACHMI NARAIN v. TURAB UN NISSA

the pedigree was incomplete and he gave in his written statement a pedigree in which Fazal Ali Khan is shown to have a daughter, Dargahi Begam, in addition to the two sons and daughter shown in the plaintiff's pedigree If Dargahi Begam was alive at the death of Maqsud Ali Shah, she was entitled to the property in preference to the plaintiff It has been contended on behalf of the plaintiff that if the defendant had intended to plead that Dargahi Begam was entitled to succeed in preference to the plaintiff, this would have been put forward specifically in the court below There is a good deal to be said for this argument But at the same time the defendant distinctly pleaded that Fazal Ali Shah had a daughter Dargahi Begam, and it was the business of the plaintiff to prove either that Dargahi Begam was not the daughter of Fazal Ali Shah or that she died in the life time of Maqsud Ali Shah or to show that, although Dargahi Begam was entitled to succeed Maqsud Ali Shah in 1899 she, the plaintiff, was entitled to the property at the date of the suit The point seems to have been overlooked and we think that the proper course is to order further inquiry on the subject We, therefore, remit to the lower appellate court for trial the question whether the plaintiff is entitled to the *malikana* Both parties may adduce further evidence On return of the findings ten days will be allowed for objections

Issue remitted

1912
January 6

Before Mr Justice Karamat Husain and Mr Justice Chamier

MUHAMMAD AHMAD SAID KHAN (PLAINTIFF) *v* MUHAMMAD MASIH ULLAH KHAN (DEFENDANT) *

Act (Local) No II of 1901 (Agra Tenancy Act) sections 166 201—Lessee continuing to be recorded as such after expiry of the lease—Suit for profits—Presumption

The lessee of a mortgage of zamindari property was recorded as entitled to the profits of the share and remained so recorded even after the mortgage had been redeemed *Held* in a suit for profits that the lessee was entitled to recover so long as he was recorded *Durga Prasad v Hazari Singh* (1) followed

THE facts of this case are, briefly, as follows —

Rafat Khan and Musammat Majid un nissa owned a six anna share in the village of Dhobra They mortgaged their share to one Haji Yusuf Khan, who sub mortgaged it to his wife, Musammat Zohra Begam who was herself the proprietor of a two anna share in the aforesaid village This sub mortgage was usufructuary Zohra Begam executed a lease in respect of the whole eight anna share in favour of the plaintiff appellant, Ahmad Said Khan The latter was recorded as a co-sharer, and he brought the present suit against the defendant lambardar for his share of the profits for the years 1313 15 Fasli Before the expiry of the lease, however Rafat Khan and Majid un nissa redeemed their property in 1314, and mutation was made in their favour But the plaintiff still continued to be recorded as lessee in respect of the whole share

The defence raised was that the plaintiff was only a lessee, and that the property had been redeemed subsequently The court of first instance, however, decreed the suit on the basis of the entry in the revenue records The lower appellate court modified this decree The plaintiff appealed

Maulvi *Muhammad Ishaq* (with him Dr *Satish Chandra Banerji*), for the appellant —

The suit should have been decreed *in toto* Plaintiff was a recorded co sharer during the whole period, and section 201 of Act II of 1901, applies Sections 33 and 142 of Act III of 1901, may

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* Second Appeal No 469 of 1911 from a decree of A Sabonadiere District Judge of Aligarh dated the 29th March 1911 modifying a decree of Kewal Krishna Assistant Collector first class of Etah dated the 4th of November 1910

(1) (1911) I. L. R. 33 All., 799

be read to illustrate the meaning of the word 'proprietor' The word has been used in an extended sense in section 201 of Act II, as appears from section 166, and plaintiff was entitled to bring his suit

1912

MUHAMMAD AHMAD SAID KHAN v MUHAMMAD MASIH ULLAH KHAN

Maulvi *Muhammad Rahmat ullah* (for Maulvi *Ghulam Mujtaba*), for the respondent —

According to section 4, clause (5) of Act II of 1901, a *thekadar* has only the status of a tenant The mere fact of his being recorded cannot invest him with a proprietary title The original lessee may also be recorded in respect of the same share He cannot be said to be the legal representative of a co sharer as the word 'legal representative' is defined in the Code of Civil Procedure He may not have authority under the lease to exercise such powers Mutation in his favour will not confer such a right Reference was made to *Durga Prasad* v *Hazari Singh* (1)

KARAMAT HUSAIN and CHAMIER, JJ —This appeal arises out of a suit brought by the appellant for an eight anna share of the profits of a mahal of which the defendant respondent is the lambardar The owner of a six anna share mortgaged it to one Muhammad Yusuf Khan, who sub mortgaged it to Zohra Begam, who was herself the owner of a two anna share in the mahal Zohra Begam gave the lease of the whole eight anna share to the appellant, and it is on the strength of that lease that the appellant in the present cas has claimed a share of profits as against the lambardar One of the defences to the suit was that the lease was not in force during two of the three years in question It appears that the mortgage was redeemed in August, 1906, that is to say, at the end of 1313 Fasli It is contended that the lease must have come to an end when the mortgage was redeemed. The lower appellate Court accepted that argument and gave the appellant a decree for only a two anna share of the profits for the years 1314 and 1315 Fasli In second appeal it is contended that this decision is erroneous, and that the case is governed by section 201 of the Tenancy Act It has been found by the lower appellate Court that, notwithstanding the redemption of the mortgage, the appellant continued to be recorded as lessee of the whole eight anna share The suit is brought under chapter XI

(1) (1911) I. L. R., 33 All. 799

1912

Muhammad Ahmad Said Khan v. Muhammad Masih Ulla Khan

of the Tenancy Act The appellant is a co sharer within the meaning of that chapter, for it is provided by section 166 of the Act that the word "co sharer" includes the heirs, legal representatives, executors, administrators, and assigns of a co sharer It is as a signee of a co sharer that the appellant has brought this suit For the time being he is to be treated as proprietor of a share as between himself and other sharers for the purpose of the settlement of profits It seems to me that he is a person who, within the meaning of section 201 of the Act, is recorded as having a proprietary right entitling him to institute this suit Under sub section (3) of that section the court is bound to presume that the appellant has a right entitling him to institute this suit It was so held by the Full Bench of this Court in *Durga Prasad* v *Hazari Singh* (1) The appellant is entitled to an eight anna share of the profits for the years 1314 and 1315 Fasli, and it is not now disputed that he is entitled to an eight anna share of the profits for the year 1313 Fasli

The next point taken by the appellant is that the lower appellate court ought to have allowed him interest on the profits up to the date of the suit, at the rate of twelve per cent per annum and not at the rate of the ten per cent as it did In the circumstances of the case we think that the appellant has no ground for complaint in respect of the rate of interest allowed to him

The third and last point taken by the appellant is that the lower appellate court is wrong in calculating the profits on 90 per cent of the recorded rental in the years 1313 and 1314 Faslis and is wrong in calculating profits for 1315 Fasli on the actual collections The learned District Judge has given his reasons for declining to calculate profits on more than 90 per cent of the recorded rental for the years 1313 and 1314 Faslis, and we need only say that we see no reason to differ from him The year 1315 Fasli was a very bad year The collections were Rs 2,077, out of the recorded rental of Rs 3,305 It is clear that in such a year as that, the whole of the rental could not have been recovered, and we are not prepared to say that the learned Judge was wrong in calculating the profits on the actual collections

(1) (1911) I L. R., 33 All., 799

The result is, that we allow the appeal, modifying the decrees of the courts below, give the appellant a decree for Rs 2,664 13-8, with interest, from the date of the institution of the suit to that of realization, at the rate of six per cent per annum The parties will pay and receive proportionate costs in all three courts Interest will not be calculated upon costs

1912

MUHAMMAD AHMAD SAID KHAN v MUHAMMAD MASIH ULLAH KHAN

Appeal decreed

Before Sir Henry Richards Knight Chief Justice and Mr Justice Banerji.

1912 *January* 10

RAM CHANDRA DAS (PLAINTIFF) v FARZAND ALI KHAN AND OTHERS (DEFENDANTS)*

Act No III of 1877 *(Indian Registration Act) sections* 32 60, 75—*Registration—Presentation—Endorsement of registering officer—Presumption—Evidence—Act No I of* 1872 *(Indian Evidence Act) section* 114

A document was presented to a Sub-Registrar for registration by a *karinda* of the person in whose favour it was executed It was received for registration Simultaneously with the presentation an application was made to summon the executants They failed to appear and the Sub Registrar considering that execution was not admitted refused to register the document The matter came up before the District Registrar by means of an application under section 73 of the Registration Act and the presence of the executants having been secured the District Registrar ordered that the document should be registered The document was apparently then sent by the Registrar to the Sub Registrar by whom it was registered

Held that in the absence of evidence to the contrary it must be presumed that the *karinda* who presented the document was duly authorized in that behalf and further that even if the Registrar had in fact sent the document direct to the Sub Registrar instead of returning it to the person who had presented it for registration this fact alone was not sufficient to invalidate the registration *Mohammed Ewaz* v *Birj Lall* (1) referred to *Mujib un-nissa* v *Abdur Rahim* (2) and *Ishri Prasad* v *Baij Nath* (3) distinguished

THE facts of this case were as follows —

One Farzand Ali executed a mortgage bond on the 5th of February, 1888 The name of his mother also appeared on the bond as an executant, but she did not execute it The property admittedly belonged to Farzand Ali The bond was taken for registration by Jasondhi Rai, a *karinda* of Bansi Rai, in whose favour the bond was executed There was nothing to show if the

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* First Appeal No 244 of 1910 from a decree of Muhammad Shafi Subordinate Judge of Saharanpur dated the 29th of June 1910

(1) (1877) I L R 4 I A 166 (2) (1901) I L R 23 All. 233
(3) (1906) I L R 28 All 707

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RAM CHANDRA DAS v FARZAND ALI KHAN

karinda held a power of attorney executed in his favour The executant was summoned but failed to appear The Sub Registrar issued a warrant, but Farzand Ali again failed to put in any appearance Taking this to mean a denial of execution, the Sub Registrar refused registration of the bond on 6th December, 1888 An application under section 73 of the Registration Act, III of 1877, was made to the District Registrar, who ordered registration of the bond, Farzand Ali having appeared before him and admitted execution The District Registrar, however, instead of returning the bond to the applicant to get it registered, sent it direct to the Sub Registrar, who registered it Upon these facts the Subordinate Judge held that the document not having been properly presented was not registered according to law and was inadmissible in evidence He accordingly dismissed the suit The plaintiff appealed

The Hon'ble Pandit *Moti Lal Nehru* (with him Dr *Satish Chandra Banerji*), for the appellant, contended that there was no defect in the matter of presentation The question of presentation would have arisen if the document had been returned to the appellant by the District Registrar If it is not properly presented it is not entitled to registration The law cast a duty on the officer of satisfying himself that all that should be done has been done

The Privy Council in *Mujib un nissa* v *Abdur Rahim* (1) only held that where the agent duly authorized to present the document did so after the death of the principal he could not do so The death of the principal revoked the authority The irregularity was apparent there on the face of the certificate No irregularity appeared here

[The Hon'ble Pandit *Sundar Lal*, for the respondent referred to F A 79 of 1910, decided on 12th February 1911, (unreported) and *Ishri Prasad* v *Baij Nath* (2)]

In 28 All also the registration proceedings clearly showed that the person presenting it had no authority to do so There is a presumption in favour of everything having been rightly done—section 87 of the Registration Act and 114 of the Evidence Act A presentation to the registering officer is quite

(1) (1901) I L R, 23 All, 233 (2) (1906) I L R, 28 All, 707

sufficient if he accepts it He must satisfy himself that it was (1) duly executed and (2) duly presented——section 74 of the Registration Act *Shah Makhun Lal Pandey* v *Shah Kundan Lal* (1) and *Mohammed Ewaz* v *Birj Lall* (2) were also cited

The Hon'ble Pandit *Sundar Lal* (with him Babu *Jogindro Nath Chaudhri*), for the respondent —

There is no presumption that a registered instrument was presented by a person duly authorized to do so The party relying on it is bound to prove this fact That is what the Privy Council lay down in 23 All A court may presume so under circumstances The production of the certificate is evidence of the particular fact A special kind of power of attorney in writing properly executed and registered in the presence of the registering officer, has to be shown by the person presenting it for registration The point is whether such a power can be presumed Even if the first presentation was correct, it has yet to be shown that the presentation required after the order of the District Registrar was made Besides, section 73 only speaks of an application for registration to the District Registrar and not a presentation for registration Under the case in 23 Allahabad, presentation by a proper person was essential Section 87 would not cure a defect in that respect When a person wishes the executant to be summoned, as here, then the application can be made by any person, and there is no presumption that a person on applying is duly authorized under section 32 Any presumption in favour of the plaintiff is rebutted by the fact that no power of attorney is produced The registration officer had to satisfy himself on two points, due registering and presentation in time There was no inquiry here as to the second point, and the presentation had to be within 30 days of the order of the District Registrar The person relying on the document must prove how and when it came before the Sub-Registrar for the second time In 28 All, the document was presented by a pleader who had full authority and the executant admitted it, and yet it was held that presentation by a "proper" person must be proved Presentation was not a question of

(1) (1875) L R 2 I A 210 (2) (1877) L R, 4 I A, 166

1912

Ram Chandra Das v. Farzand Ali Khan

procedure, as laid down by the Privy Council The original presentation could not relate back to the second presentation If section 75 did not exist, it might be argued that it did

RICHARDS, C J and BANERJI, J —This appeal arises out of a suit brought by the plaintiff against the defendants to realize the amount of a mortgage bond, dated the 5th February, 1888 The bond was originally made in favour of Bansi Lal, the father of the plaintiff Seth Ram Chandra Das The bond was apparently executed by the defendant, Rao Farzand Ali Khan, on behalf of himself and also on behalf of his mother The merits of the case have not been gone into by the court below and the question involved in this appeal is the question whether or not the learned Subordinate Judge was right in holding that the bond in suit had not been duly registered, and accordingly could not be given in evidence by the plaintiff The bond was in fact, registered to this extent at least, that it was received in the Registration office and a certificate of registration is endorsed thereon, or rather certain endorsements appear upon the bond From these endorsements it would appear that the bond was presented for registration in the office of the Sub Registrar on Monday, the 4th of June, 1888 Assuming for a moment that the bond was duly presented, within the meaning of section 32 of the Registration Act of 1877, the presentation was made in time Simultaneously with the presentation of the bond an application was made under section 36 of the same Act to summon the executants They did not appear The Sub Registrar considered that execution was not admitted and he therefore refused registration The matter then came before the District Registrar under an application made on behalf of Bansi Lal under section 73 of the Act The presence of Farzand Ali was procured and he admitted the execution of the bond The District Registrar made an order in the following terms —"The document be registered as admitted to have been executed by Farzand Ali Khan" Some way or another the bond found its way back to the Sub Registrar's office and was registered Exactly how the bond found its way back to the Sub Registrar's office is not very clear The plaintiff, who is the son of Bansi Lal, in his evidence says —"The document was not returned

to me by the Judge. It was sent to the Roorki Tahsil and it was registered there." Except this statement there is nothing to show how the bond got back to the Sub-Registrar's office, and the witness was speaking of matters which happened more than twenty years before he made his deposition and when he was a boy of about fifteen years of age. The learned Subordinate Judge held that the bond had not been duly registered and that accordingly it was not admissible in evidence. He accordingly dismissed the plaintiff's suit. Hence the present appeal.

It is argued on behalf of the defendants, first, that the bond was not in fact duly presented for registration, on the ground that the person who presented it was not authorized to make the presentation in the manner prescribed by the Registration Act, and, secondly, that, even if it be presumed that the first presentation was in accordance with law, it was necessary that there should be a second presentation by a person duly authorized after the Registrar had made his ruling on the application to him under section 73, to which we have already referred. Section 32 of the Registration Act enumerates the persons who are entitled to present a document for registration; it may be presented by some person executing or claiming under the same, or by a representative or assign of such person, or by the agent of such person, representative or assign duly authorized by power of attorney executed and authenticated in the manner prescribed by the Act. From a document issued by the Registration office, which will be found at page 16 of the appellant's book, it would appear that the document in question was presented by one Dalondhi Rai, *karinda* of Bansi Lal. Section 36 provides means for procuring the attendance before the Registrar of any person whose presence or testimony is necessary for the purpose of registration. Section 60 provides for the endorsements by the Registering Officer of a certificate of registration and further provides that such certificate shall be admissible for the purpose of proving that the document has been duly registered in the manner provided by the Act, and that the facts mentioned in the endorsements referred to have occurred as certified. In our opinion the production of the bond with the certificate of due registration endorsed thereon raised a strong presumption in favour of the *due* registration of the bond;

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and that in the absence of clear proof that the requirements of law were not complied with, the court was bound to admit the document in evidence Section 114 of the Evidence Act coupled with section 60 of the Registration Act seems to us to be abundant justification for this proposition

The defendants strongly rely on the case of *Mujib un nissa* v *Abdul Rahim* (1) In that case the person who had executed the deed and on whose behalf the application for registration purported to have been made was dead at the time of the presentation of the document for registration Their Lordships of the Privy Council held that the authorization ceased upon the death of the donor of the power of attorney, and that consequently the presentation was made by a volunteer, that is to say, by a person who had no authority whatever to "present" the document They held also that the presentation of the document was not a mere matter of procedure The distinction between the facts in this case, and in the case before us is, we think, quite obvious In the case before their Lordships it was proved by conclusive evidence, and admitted by the parties, that the person presenting the document purported to do so on behalf of the dead person In the present case (to deal with the two questions separately) it is not at all admitted that the document was presented for registration by an unauthorized person It is contended that the document to which we have already referred shows that the bond was presented by the *karinda* It does not at all follow that the *karinda* may not have been duly authorized in the manner prescribed by the Act

We have already pointed out that in our view the production, of the bond with the registration certificate endorsed thereon raised a strong presumption in favour of due registration We think that this was the view taken by their Lordships of the Privy Council in the case of *Mohammed Ewaz* v *Birj Lall* (2) At page 175 their Lordships say —

"But there is another part of the judgment of the High Court which their Lordships think required consideration The High Court say — It has been held by this Court more than once that unless a deed be registered in accordance with the substantial provisions of the law it must be regarded as unregistered though it may in fact have been improperly admitted to

(1) (1901) I L R 23 All 233 (2) (1877) L R, 4 I A 166

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registration. Their Lordships think this is too broadly stated if the High Court is to be understood to mean that in all cases where a registered deed is produced it is open to the party objecting to the deed to contend that there was an improper registration —that the terms of the Registration Act in some substantial respects have not been complied with Undoubtedly it would be a most inconvenient rule if it were to be laid down generally that all courts upon the production of a deed which has the Registrar's endorsement of due registration should be called on to inquire, before receiving it in evidence whether the Registrar had properly performed his duty Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed and it is required under the penalty that the deed shall not be given in evidence unless it be registered If it be registered, the party who has presented it for registration is then under the Act in a position which *primâ facie* at least entitles him to give the deed in evidence If the registration could at any time at whatever distance of time be opened parties would never know what to rely upon or when they would be safe

In our opinion, there is nothing in the judgement of their Lordships in the case of *Mujib-un nissa* v *Abdul Rahim* which is inconsistent with these observations

The case of *Ishri Prasad* v *Baij Nath* (1) is also relied upon by the defendants In that case the document was presented for registration by a pleader who was not duly authorized in compliance with provisions of the Registration Act, and this fact was admitted by the parties In our judgement this case is no authority for holding that the *onus* lay in the present case upon the plaintiff of showing that the requirements of the Act were duly complied with In the case mentioned above, as also in the case of *Mujib un nissa* v *Abdul Rahim,* the presumption in favour of due registration was rebutted by evidence and by the admission of the parties In the case before us there is no such evidence and no such admission We are, therefore, unable to hold that the initial presentation of the bond was defective

We now deal with the second point Section 75 of the Registration Act provides as follows —

If the Registrar finds that the document has been executed and that the said requirements have been complied with, he shall order the document to be registered And if the document has been duly presented for registration within 30 days after the making of such order the registering officer shall obey the same and thereupon shall, so far as may be practicable follow the procedure prescribed in sections 58 59 and 60 Such registration shall take effect as if the document had been registered when it was first duly presented for registration

(1) (1906) I L. R., 28 All 707

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The defendants contended that the provisions of this section render it necessary that there should be a second presentation within 30 days, and that second presentation must be in all respects similar to the initial presentation made under section 32 In the first place we may point out that, but for the evidence of the plaintiff, to which we have already referred, in which he says that bond was not returned to him, but that it was sent to the Roorki Tahsil and was registered there, there is nothing to prove that the document was not in fact duly presented a second time by a duly authorized agent The evidence of the plaintiff on this particular point is very vague As we have already pointed out, he is speaking of a very ancient matter, and he does not even say who it was who brought the document for registration, and it is only an inference which may be drawn from his evidence that it was the judge, that is the Registrar, who directed the document to be sent back to the Sub Registrar for registration In our opinion, it would be hardly reasonable to bind the plaintiff by this vague statement and to hold that it is sufficient to rebut the strong presumption in favour of everything required by the Act having been duly performed However, even if we assume in favour of the defendants that the bond after it had been adjudicated upon by the Registrar was not returned by the Registrar to Bansi Lal or his attorney but was forwarded direct to the Sub Registrar, we think the matter ought to be dealt with as a defect in procedure Section 87 provides that —

Nothing done in good faith pursuant to this Act or any Act hereby repealed by any registering officer shall be deemed invalid merely by reason of any defect in his appointment or procedure'

If it was irregular of the Registrar to send the bond himself to the Sub Registrar instead of handing it back to the applicant, the irregularity was the irregularity of the Registrar not of the applicant It is, no doubt, true that their Lordships of the Privy Council say in this case of *Mujib un nissa v Abdur Rahim*, in dealing with the acceptance by the Registrar of the document from the attorney of a deceased person —

It has been suggested however that the error of a Registrar was a defect in his procedure only and accordingly under section 87 does not invalidate the act of registration To their Lordships the error appears to be of a more radical nature. When the terms of section 32 are considered with due regard to the nature of registration of deeds it is clear that the power and jurisdiction of the

Registrar only come into play when he is invoked by some person having a direct relation to the deed

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Their Lordships were here dealing with the initial presentation for registration and that presentation was made by a mere volunteer For the purposes of the point we are now dealing with, it must be presumed that the bond was originally presented by a person duly authorized and that the error, if any, which was committed was the sending of the bond by the Judge to the Sub-Registrar instead of handing it back to the party to be presented. In our opinion the second point which has been argued in support of the decision of the learned Subordinate Judge also fails

We, therefore, hold that the appeal should be allowed We accordingly allow the appeal, set aside the decree of the learned Subordinate Judge and remand the case to his court under order XLI, rule 23 of the Code of Civil Procedure, to be heard and determined according to law The appellant will have his costs in this Court Other costs will abide the result

Appeal allowed.

Before Mr Justice Karamat Husain and Mr Justice Chamier

1912 *January* 11

HABIB ULLAH AND OTHERS (DEFENDANTS) v ABDUL HAMID AND OTHERS (PLAINTIFFS) AND NABI BAKHSH AND OTHERS (DEFENDANTS) *

Bengal Regulation XV of 1793—Mortgage—Redemption—Limitation—Act No XIV of 1859 (Limitation Act) section I (1?)—Accounts

A usufructuary mortgage was executed in the year 18?2 in a place to which the provisions of Bengal Regulation XV of 1793 applied It provided that the mortgagees should enter into possession and collect the rent and pay the Government revenue and defray collection charges &c therefrom and retain the balance in lieu of interest There was to be no accounting on either side and the mortgagor was to be entitled to redeem on payment of the principal sum of Rs 252

Held on suit by the representative of the mortgagor to redeem brought within 60 years from the date of the mortgage that the suit was within time that the mortgage could not be considered as redeemed in the strict sense of the term from the moment when the profits received by the mortgagees became equal to the amount due to them for principal and interest and that the mortgagor was notwithstanding anything contained in the deed entitled to an account

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* Second Appeal No 607 of 1910 from a decree of Ram Autar Pande District Judge of Azamgarh dated the 2nd of February 1910 confirming a decree of Ram Chandra Chaudhri, Subordinate Judge of Azamgarh, dated the 30th of June 1909

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of the profits received by the mortgagees *Sudarshan Das Shastri v Ram Prasad* (1) followed *Shafi un nissa v Fazl Rab* (2) and *Badri Prasad v Murlidhar* (3) distinguished

THE facts of this case were as follows —

On the 12th of February 1852, one Muslima Bibi made a mortgage by way of a *zar i peshgi* lease of an eight anna share of a village Patua for the period of six years in consideration of Rs 215 in favour of Akbar Ali and Yar Muhammad, the predecessors in title of defendants Nos 1 to 50 The deed provided that Rs 12 per annum would be paid as profits in lieu of interest The plaintiffs, who had acquired the property from the successors of the mortgagor, brought the present suit for redemption on the 27th of June, 1908 They also claimed Rs 2,175 13 11 as mesne profits, as well as interest at the rate of 12 per cent per annum, alleging that it could be awarded under Bengal Regulation XXXIV of 1803 Defendants contended that the suit was barred by limitation, and that they were not liable for any mesne profits or interest

The court of first instance held that the suit was governed by article 148, schedule II, of the Limitation Act, and was within time It also held that the plaintiffs were entitled to mesne profits and interest, and decreed the suit The lower appellate court confirmed this judgement The plaintiffs appealed

Dr *Tej Bahadur Sapru* (with him Maulvi *Muhammad Ishaq*) for the appellants —

The mortgage, being made in 1852, was governed by Bengal Regulation XV of 1793 Section 10 of that Regulation provides as follows —"All such mortgages are to be considered as virtually and in effect cancelled and redeemed, whenever the principal sum with simple interest due upon it shall have been realized from the usufruct of the mortgaged property, &c" The plaintiffs sue for redemption on the ground that the mortgage debt has long ago been satisfied by the usufruct, and they claim the surplus as mesne profits If the mortgage was satisfied by the usufruct, it must be considered under section 10 of Regulation XV of 1793, to have been cancelled and redeemed at once No period of limitation was necessary under the Regulation, as

(1) (1910) I. L R. 33 All. 97 (2) (1910) 7 A L J. 787
(3) (1879) I. L. R. 2 All. 593

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the relation of mortgagee and mortgagor ceased to exist, and the plaintiff's remedy was by an ordinary suit for recovery of possession for which an ordinary period of limitation was provided The fact of redemption was under the Regulation completed by the satisfaction of the mortgage from the usufruct, and did not require a decree of court to establish it as it does now The Regulation was repealed by section 1 of Act XXVIII of 1855, but section 10 was not affected The Preamble of Act XXVIII refers only to the repeal of the Usury Laws, and section 7 of that Act also enacts a saving He also cited *Samar Ali* v *Karam ullah* (1)

[Mr *Abdul Raoof*, for the respondents, here referred to *Sudarshan Das Shastri* v *Ram Prasad* (2)]

With all due respect to the learned Judges responsible for that ruling it does not contain a correct interpretation of this Regulation The word, 'redeemed' is used in section 10 in its fullest sense From the very day the mortgage is *cancelled and redeemed*, the possession of the mortgagee become adverse to the mortgagor His position becomes no better than that of a trespasser It is true that this is not the law now, but it was so under the old Regulation The interpretation in 7 A L J R, 963, reads words into section 10 which are not there The section clearly says *cancelled and redeemed* As to *Pokhpal Singh* v *Bishan Singh* (3), the case cited by the lower appellate court, the mortgage in that case was not governed by the provisions of Regulation XV of 1793 As to the fact that when a mortgage is satisfied out of the usufruct, it becomes extinct, and the parties are relegated to the position in which they were before the mortgage, see *Gobardhan* v *Suraj* (4) Regulation XV was extended to Azamgarh by Regulation XVII of 1806 Section 10 of Regulation XV had not been modified till it was repealed by the Transfer of Property Act He also cited *Fakir Baksh* v *Sadat Ali* (5) The plaintiffs have no right to any account Even if any surplus be held to be due, no interest should be awarded He cited *Badri*

(1) (1886) I L R 8 All 402
(2) (1910) I L R 33 All 97
(3) (1897) I L R 20 All, 115
(4) (1894) I L R 16 All, 254 at 255
(5) (1885) I L R 7 All 376

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Prasad v *Murlidhar* (1), *Shafi un nissa* v *Fazl Rab* (2) and *Bechoo Singh* v *Rai Sheo Sahoy* (3)

Mr *Abdul Raoof*, for the respondents, was heard only on the question of interest

The mortgagee was awarded 12 per cent under Regulation XXXIV of 1803 The mortgagor should also be awarded the same rate As to an account and mesne profits, that is provided for by section 11 of Regulation XV of 1793

KARAMAT HUSAIN and CHAMIER, JJ —This appeal arises out of a suit by respondents 1, 2 and 3, for redemption of a mortgage made in the form of a *zar i-peshgi* lease on February 12th, 1852, by one Muslima Bibi, in favour of the appellants and respondents 4 to 48 or their predecessors in title The deed provided that the mortgagees should enter into possession and collect the rents and pay the Government revenue and defray collection charges &c, therefrom and retain the balance in lieu of interest There was to be no accounting on either side and the mortgagors were to be entitled to redeem on payment of the principal sum Rs 252 The case of the plaintiffs respondents was that the mortgage was subject to the provisions of Bengal Regulation XV of 1793, therefore, the mortgagees were not entitled to more than 12 per cent per annum on the principal sum, notwithstanding the provisions of the deed, and that if an account were taken of profits received by the mortgagees, it would be found that the principal sum and interest had been satisfied many years ago, and that a large sum was due to the plaintiffs respondents The Subordinate Judge gave them a decree for possession of the property and for Rs 3,305 8 9 on account of surplus profits and interest thereon up to the date of the suit and directed an inquiry as to the profits during the suit and up to the delivery of possession The decree was confirmed on appeal by the District Judge In second appeal it is contended in the first place that the suit is barred by limitation Dr *Tej Bahadur* argues that if Regulation XV of 1793 applies, as the plaintiffs respondents say, the mortgagees were not entitled to more than 12 per cent per annum on the principal sum notwithstanding the

(1) (1879) I L R 2 All 593 (2) (1910) 7 A L J 737
(3) (18 9) N W P, H C Rep. 111

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terms of the deed, and an account must be taken of what the mortgagees have received and the mortgage must be considered to have been in the words of section 10 of the Regulation "virtually and in effect cancelled and redeemed" as soon as the principal sum with simple interest at 12 per cent. per annum had been realized from the usufruct of the property, and thereafter the mortgagee's possession must be deemed to have been adverse, consequently the mortgagor's right to recover the property was barred under section I (12) of the Limitation Act XIV of 1859, on the expiry of 12 years from the date on which the principal and interest were satisfied out of the usufruct. There can be no doubt that the mortgage was originally subject to Regulation XV of 1793, which was made applicable to the Azamgarh district by Regulation XVIII of 1806, and that, as held in *Samar Ali* v. *Karimullah* (1), it remained subject to the former Regulation notwithstanding the passing of the Usury Laws Repeal Act XXVIII of 1855. Therefore the plaintiffs were entitled to an account of the profits received by the mortgagees. But we cannot accept the argument that the right of the mortgagors to recover the property became barred by limitation upon the lapse of twelve years from the date on which the principal and interest were satisfied out of the usufruct. Prior to the passing of Act XIV of 1859, there was no limitation for a suit for redemption of a mortgage. Section I (15) of that Act provided that the period of limitation applicable to a suit against a mortgagee for the recovery of immovable property mortgaged should be sixty years from the date of the mortgage, and there are similar provisions in the Limitation Acts of 1871, 1877 and 1908. The possession of a mortgagee does not become adverse to the mortgagor merely because the mortgagee remains in possession after the mortgage money has been satisfied out of the usufruct or has been otherwise paid off. Much more is required to set time running against the mortgagor. We agree with the *Sudarshan Das Shastri* v. *Ram Prasad* (2) that the provision in section 10 of the Regulation of 1793, that a mortgage shall be deemed to be cancelled and redeemed, does not mean redeemed in the full sense of the word. It appears to us that on the

(1) (1886) I. L. R. 8 All. 402. (2) (1910) I. L. R., 33 All., 97.

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passing of Act XIV of 1859 the mortgagor's right to redeem became subject to section I (15) of that Act and a suit for redemption could be brought at any time within sixty years of the mortgage In our opinion the suit is not barred by limitation

The next point taken is that the plaintiffs respondents are not entitled to an account of the profits received by the mortgagees As already stated, we are of opinion that the mortgage has all along been subject to the provisions of Regulation XV of 1793, therefore the plaintiffs respondents are entitled to an account of the profits Dr *Tej Bahadur* relied upon the decision in *Shafi un nissa* v *Fazal Rab* (1), but the mortgage in that case was made in January, 1866, and therefore was never subject to the Regulation of 1793 He relied also on the case of *Badri Prasad* v *Murlidhar* (2), but that case is clearly distinguishable from the present case The sum to be received by the mortgagee was a fixed sum, not as here a fluctuating amount, and their Lordships were careful to point out that they did not decide that, if the amounts received by the mortgagee had been fluctuating, it would not have been necessary to take an account against him

The third and last point taken is, that the courts below were wrong in allowing the plaintiffs respondents interest at 12 per cent per annum on the annual surplus profits In allowing interest at the above rate the courts below relied upon the judgement of this Court in *Bechoo Singh* v *Rai Sheo Sahoy* (3), in which it was said that it was an established practice in cases of this kind to allow the mortgagor, interest on the surplus profits at the rate allowed to the mortgagee on the mortgage debt It is not contended that no interest should have been allowed and in the circumstances, we think that 12 per cent is a fair rate

The appeal fails and is dismissed with costs

Appeal dismissed

(1) (1910) 7 A L J, 787 (2) (1873) I L R 2 All, 593 L R 7 I A, 5
(3) N W P H C Rep 1869 p 111

REVISIONAL CRIMINAL

1912
January 17

Before Mr Justice Karamat Husain

ABDUL GHAFUR AND ANOTHER v RAZA HUSAIN

Criminal Procedure Code section 476—Preliminary inquiry—Revision

When a Magistrate takes action under section 476 of the Code of Criminal Procedure it is not necessary to the validity of his order that he should hold a preliminary inquiry nor if he does hold preliminary inquiry, is it necessary that he should give the person against whom such inquiry is being held an opportunity of cross-examining the witnesses *Queen Empress v Matabadal* (1) followed.

Maulvi *Muhammad Rahmat ullah*, for the applicants

The Assistant Government Advocate (Mr *R Malcomson*) (with whom Babu *Durga Charan Singh*) for the opposite party

In this case an Assistant Collector of the first class acting under section 476 of the Code of Criminal Procedure directed certain persons to be prosecuted under section 193 of the Indian Penal Code The persons against whom this order was made appealed to the District Judge, who rejected their appeal They then applied to the High Court on the criminal side for revision, but this was held to be barred They then prayed that their application might be considered as one on the civil side and contended that the Assistant Collector was wrong in that he had not allowed the applicants an opportunity of cross examining the witnesses examined before him in the inquiry under section 476 of the Code of Criminal Procedure

KARAMAT HUSAIN, J —In this case an Assistant Collector of first class acting under section 476, Criminal Procedure Code, directed the applicants to be prosecuted under section 193 of the Indian Penal Code The applicants appealed to the learned District Judge of Banda, for revoking the sanction The application was rejected by the learned District Judge and the order of the Assistant Collector was confirmed The applicants came to this Court in revision on the criminal side The learned vakil for the opposite party, relying on the Full Bench ruling of this Court in *In the matter of the petition of Bhup Kunwar* (2), contends that the High Court has no jurisdiction, in the

Criminal Revision No 653 of 1911 from an order of Muhammad Ali, District Judge of Banda dated the 31st of July 1911

(1) (1893) I L R 15 All. 392 (2) (1903) I L R, 26 All., 249

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ABDUL GHAFUR v RAZA HUSAIN

exercise of its revisional powers on the criminal side under section 439 of the Code of Criminal Procedure to interfere with such orders The Full Bench ruling in the case referred to is binding upon me The learned vakil for the applicants prays that permission may be given to him to alter the application into a civil revision, inasmuch as the order passed by the Assistant Collector of the first class is based on the statements of the witnesses who were not allowed to be cross examined by the applicants In *Chota Sadoo Peadah* v *Bhoobun Chuckerbutty* (1) it was laid down that the preliminary inquiry need not be held in the presence of the accused, and in *Queen Empress* v *Matabadal* (2), it was ruled that when a Magistrate takes action under section 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order that he should hold a preliminary inquiry I am, therefore, of opinion that the Magistrate in refusing to give the applicants an opportunity to cross examine the witnesses did not act in the exercise of his jurisdiction illegally or with material irregularity For the above reasons, I reject the application

Application rejected

APPELLATE CIVIL

1912
January, 18

Before Mr Justice Karamat Husain and Mr Justice Chamier

JUGAL KISHORE AND OTHERS (DEFENDANTS) v RAM NARAIN AND OTHERS (PLAINTIFFS) *

Act No IV of 1882 (Transfer of Property Act) section 101—Purchase—Satisfaction of mortgage on property purchased—Intention of purchaser to keep mortgage alive for his benefit—Presumption

In considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property the point of time to be regarded is the date of the acquisition of the property If an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it the charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive *Liquidation*

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* Second Appeal No 416 of 1911, from a decree of H E L P Dupernex District Judge of Mainpuri dated the 21st of February 1911 confirming a decree of Banke Behari Lal Subordinate Judge of Mainpuri, dated the 29th of June 1910

(1) (1863) 9 W R, C R 3 (2) (1893) I L R 15 All 392

Estates Purchase Co v *Willoughby* (1) followed *Bindeshuri Singh* v *Pandit Balraj Sahai* (2) and *Mohesh Lal* v *Bawan Das* (3) referred to

THE facts of this case were as follows —

Adhar Singh and others executed a mortgage for Rs 405 in favour of Shiva Singh and others, the predecessors of the present plaintiffs, on the 8th of January, 1884 This deed was registered on the 11th of January, 1884 On the 17th and 18th of January, 1898, the mortgagors executed two sale deeds in respect of the mortgaged property in favour of the mortgagees, part of the consideration being the mortgage of the 8th of January Subsequently a suit for pre emption was brought by the defendants respondents, which succeeded The plaintiffs then brought the present suit on their mortgage of 1884 The defendants pleaded that the mortgage was extinguished by the sale deeds of 1898 The court of first instance held that, the pre emptors having obtained possession of the property, the mortgagees had not acquired any right of ownership therein, and were therefore entitled to sue on their mortgage He decreed the suit The lower appellate court confirmed this decree The defendants appealed

Babu *Jogindro Nath Chaudhri* (with him Mr *A P Dube*), for the appellants —

The mortgage must be deemed to be extinguished under section 101 of the Transfer of Property Act The sale was complete, and the pre emptor merely stepped into the shoes of the mortgagees There is no evidence that the latter intended to keep the mortgage alive, or that its continuance would be for their benefit He cited *Mohesh Lal* v *Mahant Bawan Das* (3), *Ram Kishan Upadhia* v *Dipa Upadhia* (4), *Baldeo Prasad* v *Uman Shankar* (5) and *Ahmad Shah* v *Wali Dad Khan* (6)

[CHAMIER, J , referred to the ruling in 10 Oudh Cases, p 49]

Munshi *Gokul Prasad*, for the respondents —

The case in 9 Calc , 961, merely held when a prior charge merged into a subsequent security It is a question of intention, and should be decided in the circumstances of each particular case No general rule can be inferred from this ruling *See*

(1) [1898] A C 321
(2) (1906) 10 Oudh Cases 49
(3) (1883) I L R., 9 Calc 961
(4) (1891) I. L R 13 All. 581
(5) (1907) I. L R 32 All, 1
(6) Punj Rec 1906 348

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JUGAT KISHORE v RAM NARAIN

Ghosh on Mortgage p 470 The prior security revives when the latter is ineffectual See 9 Calc, 961 at p 975 Merger is not necessarily created by the vesting of the proprietary and mortgagee rights in the same person Even when there may be a merger, a court of equity will hesitate in holding it so, *Forbes* v *Moffat*, 18 Ves, 384 Intention may be presumed from the subsequent suit for pre emption The continuance of the mortgage would be for the benefit of a mortgagee, whose pur chase may be liable to be defeated by the claim of a pre emptor In the cases in 10 Oudh cases and the Punjab Record for 1906, the mortgagee desired to enforce his mortgage as well as to remain in possession This is not the present case The property has passed out of the possession of the mortgagees The ruling in 10 Oudh cases refers to an English case which was subsequently upset on appeal

Babu *Jogindro Nath Chaudhri* was not heard in reply

CHAMIER, J —This was a suit for a decree for sale upon a mortgage, dated the 8th of January, 1884, made by Adhar Singh and others, in favour of the respondents On the 17th and 18th of January, 1898, the mortgagors by two deeds sold the mort gaged property to the respondents for an ostensible consideration of Rs 1,800, of which Rs 500 were said to have been retained by the respondents on account of a mortgage of January 11th, 1894 There was no mortgage of that date—the *intention* was to refer to the mortgage of the 8th of January, 1884 The mis take in the day of the month seems to have been due to the fact that the mortgage of the 8th of January, 1884, was registered on the 11th of January, and the mistake in the year seems to have been a purely clerical error In 1899, the appellants brought a suit for pre emption saying that there was no such mortgage as the one referred to in the sale deed, and that the statement in the deed that Rs 500 had been retained on account of a pre vious mortgage had been made for the purpose of making it appear that the consideration was larger than it really was The respondents produced two witnesses, who swore that there was a previous mortgage of the date given in the sale deed That evidence was disbelieved, and at the last moment the respondents produced a copy of the mortgage of the 8th of January, 1884,

and said that a mistake had been made in the sale deed, and the sum of Rs 500 had been retained on account of that mortgage That explanation was rejected and a decree was made for pre emption on payment of Rs 1,300 The respondents appealed on another point, saying in their grounds of appeal that they would enforce their rights under the previous mortgage by a separate suit They brought the present suit in July, 1909 The defence of the appellants was, and is, that if there was any mortgage in existence in favour of the respondents when they (the respondents) bought the property in 1898, it must be taken to have then ceased to exist according to the rule contained in section 101 of the Transfer of Property Act The respondents contend that the mortgage must be deemed to have continued to subsist, as the continuance of it was for their benefit The rule contained in section 101 of the Transfer of Property Act reproduces a rule well known to English Courts of Equity, with reference to which many cases are to be found in the English and Indian Reports Upon the authorities it is quite clear that in considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property the point of time to be regarded is the date of the acquisition of the property One of the latest English cases in which the rule was considered is that of the *Liquidation Estates Purchase Co* v *Willoughby* (1) In his judgement in that case the Master of the Rolls said —"We take it to be clear that if an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it, that charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive" The decision of the Court of Appeal was reversed by the House of Lords on the facts, but the correctness of the statement of the law contained in the judgement of the Master of the Rolls was not challenged In fact, at page 339 of the report, Lord Macnaghten quotes the following passage from his judgement with approval —"The answer to this question depends upon the intention

(1) [1898] A C, 321

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of the parties at the time and that intention must be found from the terms of the deed and the circumstances under which it was executed" It was contended by Mr *Gokul Prasad* that at the time of the sale deeds it was for the benefit of the purchasers that the mortgage should continue to subsist in view of the probability or possibility of a claim for pre emption being preferred But I do not understand how a mortgage on the property could defeat a claim for pre emption A pre-emptor must pay the price actually and in good faith paid for the property by the purchaser, however the price may be made up The mortgage money was overdue, therefore any person obtaining the property by pre emption could pay it off, whether the mortgagees consented or not There might have been some ground for the argument if the mortgage had been with possession for a long term of years as in *Bindeshuri Singh* v *Pandit Balraj Sahai* (1), but even in such a case, I think, it should be held that the continuance of the mort gage was not for the benefit of the purchaser In the present case, in the view which I take of the law, there seems to be no ground whatever for holding that the continuance of the mortgage was for the benefit of the respondents The fact that it would now be convenient for the respondents to be able to set up the mortgage has no bearing on the question See *Mohesh Lal* v *Bawan Das* (2) The respondents have themselves to thank for what has happened They accepted a deed of sale contain ing incorrect particulars of a previous mortgage and they followed this up by producing absurd evidence in the pre-emption suit We were asked to hold that the appellants were estopped by their conduct in the pre emption suit from denying the continued ex istence of the mortgage, but it seems to be impossible to do that The appellants were not parties to either the mortgage or the sale It is not shown that they knew anything about the mort gage The respondents set up a mortgage in order to prove that the price was Rs 1,800 and failed to prove it, with the result that the appellants obtained the property free from incumbrances for Rs 1,300 That was the fault of the respondents The mortgage was non-existent at the date of the pre-emption suit, and it

(1) (1900) 10 Oudh Cases, 49 (2) (1883) I L.R., 9 Calc., 961

cannot be revived in order to remedy the error of the court or a party in the pre emption suit

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In my opinion, the respondents have no right to sue the appellants upon the mortgage of 1884, and their suit should have been dismissed.

I would allow this appeal and dismiss the respondent's suit with costs in all three courts

KARAMAT HUSAIN, J —I agree with my learned colleague in the order proposed by him

BY THE COURT —The order of the Court is that the appeal be allowed and the respondents' suit be dismissed with costs in all courts

Appeal allowed

Before Mr Justice Karamat Husain and Mr Justice Chamier

1912 January 2[illegible]

RASHIK LAL (DEFENDANT) v RAM NARAIN AND OTHERS (PLAINTIFFS)*

Act No IX of 1872 (Indian Contract Act) section 39—Contract—Mortgage—Part of consideration unpaid—Effect of such non payment

Where on execution and registration of a mortgage an interest in the mortgaged property has vested in the mortgagee the fact that part of the mortgage money as specified in the deed of mortgage has not been paid neither renders the mortgage invalid nor entitles the mortgagor to rescind it at his option *Gokal Chand* v *Rahman* (1) dissented from *Tatia* v *Babaji* (2) *Subba Rau* v *Devu Shetti* (3) *Bajrangi Sahai* v *Udit Narain Singh* (4) and *Baijnath Singh* v *Paltu* (5) referred to

THE facts of the case were as follows —

Bachu Lal and Gulzari Lal were the owners of an indigo factory They executed a usufructuary mortgage of half of it in favour of Cheda Lal, the father of the plaintiff, in August, 1894 Subsequently they sold the whole of it to Rashik Lal in May, 1895, and left Rs 750 to be paid to Cheda Lal for the usufructuary mortgage On 29th August, 1898, Rashik Lal, the defendant, executed a mortgage by way of conditional sale of the indigo factory and the zamindari property in favour of Cheda Lal for Rs 5,000, which consisted of a hundi for Rs 2,000, Rs 125 cash paid

*Second Appeal No 85[illegible] of 1911 from a decree of H E Holme District Judge of Jhansi dated the 19th of January 1911 confirming a decree of Girdhari Lal, Subordinate Judge of Jhansi dated the 25th of November 1910

(1) Punj Rec., 1907 274
(2) (1896) I L R 22 Bom 176
(3) (1894) I L R., 18 Mad 126
(4) (190[illegible]) 10 C W N., 932
(5) Weekly Notes 1908, p 85

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before execution, Rs 125 paid on registration, and Rs 750 on account of the prior usufructuary mortgage The hundi was, however, stolen by Cheda Lal, and it was not cashed The defendant served a notice, dated the 28th of September, 1898, on Cheda Lal, threatening to sue him for damages for breach of contract and to prosecute him for fraud and theft, but no such steps were taken The plaintiffs, who are the sons of Cheda Lal, sue for recovery of Rs 1,000 and interest thereon, and in default for foreclosure The defence was fraud, failure of consideration and other like pleas The court of first instance gave a decree as prayed for, on appeal the learned District Judge confirmed it, but held that the hundi was stolen by Cheda Lal The defendant appealed to the High Court

Pandit *Mohan Lal Sandal*, for the appellant, contended that owing to partial failure of consideration, the mortgage deed in suit was invalid and the plaintiffs were not entitled to sue thereon He relied on *Gokal Chand* v *Rahman* (1) If the mortgage be held valid, the plaintiffs were entitled to interest up to 28th September, 1898, when notice was served He relied on section 39 of the Contract Act, and the case of *Subba Rau* v *Devu Shetti* (2) He distinguished *Bajrangi Sahai* v *Udit Narain Singh* (3) He referred further to *Ajudhia Prasad* v *Sidh Gopal* (4) and *Abhai Narain Singh* v *Padarath Singh* (5)

The Hon'ble Pandit *Sundar Lal*, for the respondents, contended that section 39 of the Contract Act did not apply, inasmuch as a mortgage was a transfer of an interest in the property, it was not a mere contract As soon as the mortgage deed was executed, the interest in the property passed, and the remedy open to the mortgagor was to sue for recovery of the consideration, but he did not sue He relied on *Baijnath Singh* v *Paltu* (6)

Pandit *Mohan Lal Sandal* was heard in reply

KARAMAT HUSAIN, J—On the 26th of August, 1898, the defendant, Rashik Lal, executed a conditional sale in favour of Cheda Lal, the predecessor in interest of the plaintiffs, to secure a sum of Rs 5,000 He stipulated that he would pay the principal

(1) Punj Rec 1907 274
(2) (1894) I L R 18 Mad 12
(3) (1903) 10 C W N 932
(4) (1887) I L R 9 All 330
(5) S A No 1174 of 1910 decided on 11th July 1911 (unreported)
(6) (1908) I L R 30 All 125

and interest on Kuwar Sudi Puno, Sambat 1956 (i e, 18th October, 1899), and would redeem the zamindari property, and that if he failed, the property should be deemed to have been sold, and the consideration was acknowledged to have been received as follows —

	Rs
Deducted	750
Received before execution of mortgage	125
Shall receive at registration	125
Received a hundi drawn by Cheda Lal	4,000

The plaintiffs brought an action for the recovery of Rs 1,000 principal and Rs 1,790 1 3 interest, or for possession of the property sold conditionally They alleged that the sum of Rs 4,000 had not been paid

The pleas in defence were that no consideration for the mortgage was paid by Cheda Lal, that the mortgage was obtained by fraud, that compound interest was barred by time and that the plaintiffs were liable to pay damages in consequence of the loss suffered by the defendant on the ground of non-payment of Rs 4,000 The suit was decreed by the court of first instance The defendant appealed and contended that the mortgage deed was obtained by fraud, that the sum of Rs 1,000 sued for was not advanced, that the mortgage contract was rescinded by the defendant, that the mortgage was unenforceable because of its breach by Cheda Lal, that compound interest was not to be awarded, and that the defendant was entitled to damages caused by the non payment of Rs 4,000

The lower appellate court found on all the points raised before it against the defendant appellant, and, dismissing the appeal, confirmed the decree of the court of first instance In second appeal it is urged that as the sum of Rs 4,000 was not paid, the mortgage was invalid, that even if it was valid, the defendant, in consequence of the non payment of Rs 4,000, rescinded it by his notice, dated the 28th of September, 1898, that he was entitled to do so under section 39 of the Indian Contract Act, 1872 (see 18 Madras, 126, Punjab Record for 1907, p 274, 10 C W N, 923), and that the whole of the mortgaged property cannot be foreclosed There is no force in

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any of the points taken by the learned vakil for the appellant There is a fundamental distinction between a contract and a conveyance, i e, a transfer of an interest in land, and for this reason the rights and duties of the parties to a contract are quite different from the rights and duties of the parties to a conveyance In the case before us, I am concerned with one of those distinctions which is recognised in section 54 of the Transfer of Property Act

In a sale, in the absence of any contract to the contrary, the ownership of the property sold passes from the vendor to the vendee as soon as the sale deed is registered Neither the delivery of possession nor the payment of the price is a condition precedent to the passing of the ownership The latest case of this Court on the subject is *Baijnath Singh* v *Paltu* (1)

A mortgage under section 58 of the Transfer of Property Act, is "the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability" The definition shows that a mortgage under the Transfer of Property Act is a transfer of an interest in the land mortgaged and not a mere contract It therefore *follows* that no sooner a valid mortgage deed is registered, an interest in the property mortgaged, in the absence of any contract to the contrary, vests in the mortgagee notwithstanding the fact that the mortgage money has not been paid by the mortgagee to the mortgagor The mere non payment of the mortgage money cannot have the effect of rendering the mortgage invalid The remarks of FARRAN, C J, in *Tatia* v *Babaji* (2) are worth noticing He says —"I am not, however, as at present advised, prepared to assent to the train of thought which puts conveyances of lands in the mofussil perfected by possession or registration where the consideration expressed in the conveyance to have been paid has not in fact been paid in the same category as contracts void for want of consideration. The radical distinction between a perfected conveyance and a contract does not seem

(1) Weekly Notes 1908 p 28 (2) (1896) I L R, 22 Bom., 176 (183)

to me to have been sufficiently borne in mind throughout the judgement"

Of course, if there is a contract to the contrary in the mortgage deed, no interest in the property mortgaged vests in the mortgagee on the registration of the mortgage deed, but in the mortgage deed of the 29th of August, 1898, there is nothing to that effect For the above reasons I would hold that the mortgage deed, dated the 29th of August, 1898, was a valid mortgage

The next point is that the mortgagor by his notice, dated the 28th of September, 1898, rescinded the contract of mortgage on the ground that out of the consideration Rs 4,000 were not paid by the mortgagee The operative part of the notice is to the following effect —"You must return the hundi to us or the money together with the loss suffered by us owing to the non payment of Rs 4,000 If you do not do so we shall sue you on the ground of your fraud, dishonesty and breach of contract" There is nothing *in the notice, as I read it, to express* any intention of rescinding the so called contract of mortgage It simply threatens to sue the mortgagee for breach of contract Supposing that it does convey the meaning contended for, I am of opinion that section 39 of the Indian Contract Act has no application, for the simple reason that it deals with contracts, and a mortgage when registered is not a contract but a transfer In *Subba Rau* v *Devu Shetti* (1) MUTTUSAMI AYYAR, J, observed —"Under section 39 of the Contract Act the mortgagee was entitled to cancel the contract of mortgage on the ground that the mortgagee in contravention of his agreement incapacitated himself for performing it in its entirety"

The terms of the mortgage are not before me, and I am therefore not in a position to say whether there was or was not a specific agreement between the mortgagor and the mortgagee, that no interest in the property mortgaged would pass without the payment of the entire mortgage money If there was no such stipulation, then, with due respect to the learned Judge, I am unable to hold that section 39 of the Contract Act empowers a mortgagor to rescind a mortgage in which an interest in the property mortgaged has already vested in the mortgagee

(1) (1894) I L R, 18 Mad 126

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In *Gokal Chand* v *Rahman* (1) it was held by a Full Bench that, in the absence of a specific contract postponing payment, failure to pay full consideration as agreed upon whether to the mortgagor or to a prior incumbrancer after the said payment has been demanded by the mortgagor avoids the mortgage and destroys the mortgagee's lien and right to possession even on subsequent tender of the unpaid consideration it being immaterial, whether the non payment has or has not caused inconvenience or loss to the mortgagor" The previous rulings of the Punjab Chief Court were conflicting and the Full Bench put an end to the conflict No reason whatsoever is given for the rule laid down, and the radical distinction between a contract and a transfer of an interest in land is totally ignored With due respect, I am unable to accept the view taken by the Full Bench

In *Bajrangi Sahai* v *Udit Narain Singh* (2) MACLEAN, C J, said —"I do not for myself see why the mortgage, which was registered, is not a perfectly good mortgage to the extent of the money actually advanced It is said that this view is inconsistent with that taken by the Madras High Court in the case of *Subba Rau* v *Devu Shetti* (3) But when we come to examine that case, I do not think it is an authority for the proposition contended for There the Court found in effect that the mortgagor had a right to cancel the contract and cancelled the contract, and it was also found that the mortgagee had acquiesced in that cancellation for about eight years Whether there was any power in that case to cancel the contract is a question which we need not enter into There is no such suggestion in the present case There is no suggestion that the mortgagor has cancelled the contract or that he had power to do so" The Calcutta case of *Bajrangi Sahai* is, in my opinion, no authority for the proposition that a mortgagor, when the interest in the land mortgaged passed to the mortgagee, has any power to cancel the mortgage I may note that the reference to the Madras case is wrong The correct reference is I L R, 18 Mad, 126

(1) 4 Punj Rec 1907 274. (2) (1906) 10 C W N 932
(3) (1894) I L R 18 Mad., 126

Section 4 of the Transfer of Property Act does not put an end to the vital distinction between a contract and a transfer of an interest in land, for it only enacts that the *chapters and* sections of the Transfer of Property Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872 But in a mortgage as soon as an interest in the land mortgaged vests in the mortgagee, the transaction ceases to be a contract and becomes *a transfer of immovable property to* which section 4 of the Transfer of Property Act does not apply

The mortgage, dated the 29th of August, 1893, was a single transaction, and the entire property mortgaged was subjected to every pie of the mortgage money advanced The mortgage of the entire property mortgaged was, in my opinion, therefore, perfectly good to the extent of the sum of Rs 1,000 (one thousand), which, according to the finding of the lower appellate court, was actually advanced by the mortgagee The plaintiffs are entitled to recover the sum of Rs 1,000, with interest at the rate agreed upon If the defendant fails to pay, they are entitled to foreclose the whole of the property mortgaged For the above reasons, I would dismiss the appeal with costs I extend the time for redemption to the 20th of July 1912

CHAMIER, J —This was a suit by the respondents upon a mortgage by way of conditional sale made in favour of their father, Cheda Lal, by the appellant, Rashik Lal, on August 29th, 1893 The consideration for the mortgage consisted of a cash advance of Rs 250, a sum of Rs 750, due upon a previous mortgage, and a hundi for Rs 4,000 drawn by Cheda Lal in favour of the appellant upon a firm in Cawnpore The hundi was stolen from the appellant by a man in the service of Cheda Lal, and the latter failed to make good the amount of the hundi to the appellant The respondents admit that the greater part of the consideration failed in this way They have sued for recovery of the sum of Rs 1,000 and interest thereon in accordance with the deed and for foreclosure in case of non payment The suit was resisted upon the ground that as the mortgagee had failed to carry out his part of the contract, his sons were not entitled to enforce the mortgage according to its terms This defence having been rejected by the courts below, the mortgagor

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has appealed to this Court He relies upon the decision of a Full Bench of the Punjab Chief Court in *Gokal Chand* v *Rahman* (1) and the decision of the Madras High Court in *Subba Rau* v *Devu Shetti* (2) The respondents rely upon the decision of the Calcutta High Court in *Bajrangi Sahai* v *Udit Narain Singh* (3), a number of decisions of this Court, the last of which is that in *Baijnath Singh* v *Paltu* (4), and two decisions of the Bombay High Court, cited in the case last mentioned The cases in this Court and in the Bombay High Court were all cases in which the purchaser of immovable property had failed to pay part of the purchase money, and it was held that the sale was nevertheless a completed transaction and passed title to the purchaser In this Court it has been held in many cases of the kind that a purchaser suing for possession of property who has not paid the whole purchase money may be required to pay the balance before he is allowed to execute a decree for possession The Bombay High Court have held distinctly that a vendor of immovable property by a registered sale deed is not entitled to rescind the sale on the ground that part of the purchase money has not been paid There appears to be no distinction in principle between the case of a sale and that of a mortgage The reasons for holding that where the ownership of immovable property has been transferred by way of sale, the seller cannot rescind the transaction because the purchaser refuses to pay the price promised, but must sue for the same, seem to apply with equal force to the case where an interest in immovable property has been transferred by way of mortgage and the mortgagee refuses to advance part of the money agreed to be advanced I think, therefore, that the decision of this Court and of the Bombay High Court support the contention of the respondents The Calcutta High Court in the case cited gave a decree for foreclosure to a mortgagee, though he had failed to pay the whole of the mortgage money to the mortgagor The decision of the Punjab Chief Court, no doubt, goes the whole length of the appellant's contention in the present case, but the learned Judges do not seem to have regarded the mortgage as a transfer of an

(1) Punj Rec 1907 274.
(2) (1894) I. L. R. 18 Mad., 126.
(3) (1906) 10 C. W. N., 932
(4) Weekly Notes, 1908 p. 38

interest in immovable property or to have distinguished between a contract to mortgage and a completed mortgage They seem to have decided as they did upon the broad ground that it is inequitable to allow a mortgagee to sue upon a mortgage where he has failed to advance part of the money agreed to be advanced The Madras decision rests upon the view that in such a case a mortgagor is entitled to rescind the mortgage, and the court seems to have held that the mortgage, in question in the case had in fact been cancelled by the mortgagor I am not prepared to say that the court is bound in every case to enforce the mortgage according to the letter where the whole of the mortgage money has not been advanced For example where the mortgagee sues for possession, he may, I think, be required to pay the balance of the mortgage money before he takes out execution of his decree, and there may be other cases in which he may properly be put upon terms In the present case there seems to be no reason for not passing a decree as prayed Under the decree, the appellant mortgagor will be given an opportunity of repaying the amount which he received from the mortgagee Even if the mortgagor in such a case is entitled to rescind the mortgage, he can do so only upon repaying the amount advanced to him It was suggested in the course of the argument for the appellant that he had in fact rescinded the mortgage There is no evidence of this The communication relied upon so far from evincing a desire to rescind shows that he intended to enforce the mortgage In my opinion, he was not entitled to rescind and never made any attempt to do so I agree that the appeal should be dismissed, but I would extend the time for redemption to the 20th of July next

BY THE COURT —The order of the Court is that the appeal will be dismissed with costs The defendants will have time to redeem up to the 20th of July, 1912

Appeal dismissed

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January
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Before Mr Justice Sir George Knox and Mr Justice Sir Harry Griffin

BRIJBASI LAL AND OTHERS (DEFENDANTS) *v* SALIG RAM AND OTHERS (PLAINTIFFS) AND PIYARE LAL (DEFENDANT)

Review of judgement—Effect of order on review—Appeal from original decree

The effect of the granting of an application for review is to supersede the decree which is the subject of such application No appeal can therefore be maintained against the decree anterior to the review but only against the subsequent decree *Kuar Sen* v *Ganga Ram* (1) and *Kanhaiya Lal* v *Baldeo Prasad* (2) followed *Uman Kunwari* v *Jarbandhan* (3) distinguished

In this case an order absolute for sale under order XXXIV, rule 5 of the Code of Civil Procedure, 1908, was made by the Subordinate Judge of Agra on the 18th of May, 1910 An application for review of this order was made on the 18th of June, 1910, and was granted on the 29th July, 1910, and a fresh order for sale was passed On the 24th of October, 1910 the defendants presented an appeal to the High Court against the order of the 18th of May, 1910, which appeal was admitted on the 22nd of April, 1910 No appeal was filed against the order of the 29th July, 1910 On the defendant's appeal coming on for hearing the respondents raised a preliminary objection to the effect that, inasmuch as the decree under appeal had been superseded in consequence of the order in review, the appeal could not be maintained, and reliance was placed on *Kuar Sen* v *Ganga Ram* (1) and *Kanhaiya Lal* v *Baldeo Prasad* (2) The appellant contended that the court below was in the circumstances not competent to review its order of the 18th May, 1910, and that the order of the 29th July, 1910, must be treated as a nullity He relied on the Full Bench case of *Uman Kunwari* v *Jarbandhan* (3)

Babu *Surendra Nath Sen* for the appellant

The Hon'ble Dr *Sundar Lal* (with him Pandit *Rama Kant Malaviya*) for the respondents

Knox and Griffin JJ —This appeal arises out of an order passed by the Subordinate Judge of Agra, on the 18th of May 1910 The Subordinate Judge had before him an application for an order absolute for sale under order XXXIV, rule 5 He

First Appeal No 114 of 1911 from a decree of Sheo Prasad Subordinate Judge of Agra, dated the 18th of May 1910

(1) Weekly Notes 1890 p 144 (2) (1905) I L R, 28 All 240
(3) (1908) I L R 30 All 479

granted the order absolute and in that order absolute he stated the amount that would be due and payable to the decree holder on the 2nd of March, 1910, and it is this order which we are asked to set aside on the ground that the Subordinate Judge had no jurisdiction to alter or amend a decree after it had been affirmed by the High Court, because (i) the Subordinate Judge had put a wrong construction upon the decree of this Court, and (ii) the Subordinate Judge had erred in framing a decree for a larger sum than the judgement authorized We need not mention the other grounds of appeal and we need not consider even those above mentioned, because the appellants are met by the respondents with an objection which appears to us fatal to this appeal It appears from the record that after the Subordinate Judge had passed his order on the 18th of May, 1910, he was asked to review the same by an application, dated the 18th of June, 1910 The application was allowed by an order, dated the 29th of July, 1910, and the order of the 18th of May modified The terms of the order, so far as they refer to the matter before us, run as follows —"It is, therefore, ordered that the objections (of the judgement debtors) be disallowed and that an order absolute for sale be prepared under rule 5, order XXXIV" This order is put forward by the respondents as the final decree in the case No appeal *has been instituted from it and no mention of it is made* in the appeal which we are now considering This appeal was presented on the 24th of October, 1910 It was not admitted, for reasons which we need not consider, until the 22nd of April, 1911 The appellants had, therefore, ample opportunity to call in question the order of the court below, dated the 29th of July, 1910 But, as we have already said, they nowhere even alluded to its existence They have not attempted to explain why they have left that decree unchallenged, and the probability is that they have overlooked its existence The learned vakil for the appellants addressed to us a very lengthy and elaborate argument in which he contended that the order of the 29th July, 1910, was an order passed without jurisdiction, a mere nullity, which would of itself appear when we pass a decree in the present appeal, and in support of this argument he cited the Full Bench ruling of this Court, *Uman Kunwari* v *Jarbandhan* (1) We

(1) (1908) I. L R 30 All, 479

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have considered that and the argument addressed to us upon that but we do not think the case to be in point What was then under consideration was a decree of a Subordinate Judge, who had reversed a decree of a Munsif and passed an order of remand under section 562 of the old Code of Civil Procedure While that appeal was pending in this Court, the court of first instance had carried out the order of remand and had decreed the plaintiff's claim Upon this Court proceeding to hear the appeal before it a preliminary objection was raised to the effect that, as the order of remand had been carried out before the appeal was filed, this court could not entertain the appeal It was held that a decree passed in pursuance of a remand was no bar, and this court proceeded to set aside the order of remand and to restore the order first passed in the case The learned Judges who decided the case of *Uman Kunwari* v *Jarbandhan*, pointed out that after the court of first instance had once decided the case, it ceased to have any jurisdiction except on review of judgement From this it is evident that the learned Judges in no way considered the exact point before us In *Uman Kunwari* v *Jarbandhan*, the order of remand was found to be erroneous and was set aside, and everything done in pursuance of the order fell to the ground In the case before us what has really happened is that the Subordinate Judge, who had jurisdiction to review his judgement, proceeded to review it and in reviewing it passed an order which does not commend itself to the appellants That order may be right or wrong, but there was jurisdiction in the Subordinate Judge There are two cases which are exactly in point, namely, *Kuar Sen* v *Ganga Ram* (1) and *Kanhaiya Lal* v *Baldeo Prasad* (2) We cannot find that these cases have ever been questioned, and we agree with what was held in them that the order for review under such circumstances superseded the original decree The decree under appeal has ceased to exist and the appeal cannot be heard We dismiss the appeal with costs

Appeal dismissed

(1) Weekly Notes 1890 p 144 (2) (1905) I L R 28 All 240

FULL BENCH

1913 January 29

Before Sir Henry Richards Knight Chief Justice Mr Justice Karamat Husain and Mr Justice Chamier

JAI NATH PATHAK AND ANOTHER (PLAINTIFFS) v KALKA UPADHYA AND OTHERS (DEFENDANTS)*

Act (Local) No II of 1901 (Agra Tenancy Act) section 9—Fixed rate tenancy - Entry of name of tenant in— Conclusive proof revenue records

The entry mentioned in section 9 of the Agra Tenancy Act 1901 is conclusive proof only as to the nature of the tenancy as between the zamindar and the tenant and does not apply to questions as to the title to the tenancy as between rival claimants thereto *Mulai Singh* v *Rajwant Singh* (1) overruled

THIS was a suit for a declaration of title to certain property including some fixed rate holdings The facts of the case are stated in the following order recommending that the appeal should be referred to a Full Bench

KARAMAT HUSAIN and CHAMIER JJ —This is the plaintiffs appeal Their claim has been dismissed by the lower appellate court on a point of law The facts must be for the present assumed to be as follows —Two brothers Ishri and Ram Narain were joint in estate Ram Narain *predeceased his brother who* thus became sole own r of the property Ishri died leaving two daughters one of whom, Musammat Anjora is still alive Possession of the property should have passed to Musammat Anjora but was taken by Musammat Rupao widow of Ram Narain Pa t of the property consisted of fixed rate tenancy and at the last revision of the settlement before the passing of the Agra Tenancy Act Musammat Rupao was recorded as the fixed rate tenant In 1908 she transferred the holding to her nephews The plaintiffs in the present suit who are the sons of the above named Musammat Anjora and her sister Musammat Nidha claim a declaration that the transfer is not binding upon them They say that the person now entitled to the holding is Musammat Anjora and that Musammat Rupao took and held possession with her consent but whether Musammat Rupao took possession with Musammat Anjora s consent or adversely to her is immaterial as they the plaintiffs will not be entitled to possession until the death of Musammat Anjora

The first court decreed the claim but on appeal the Additional Judge held that under section 9 of the Agra Tenancy Act the entry of Musammat Rupao s name as fixed rate tenant was conclusive proof that she was fixed rate tenant of the land and therefore it was her *stridhan* and the plaintiffs claim to be reversionary heirs of Ishri in respect of the holding failed He accordingly dismissed the suit

* Second Appeal No 191 of 1911 from a decree of E E [illegible] Judge of Jaunpur dated the 10th of D cember 1910 [illegible] of [illegible] Lal Mech Munsif of Jaunpur dated the 22nd of April [illegible]

(1) Weekly Notes, 1906, p 68.

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The view taken by the lower appellate court receives support from the decision of this Court in *Mulai Singh* v. *Rajwant Singh* (1) which he quotes. As at present advised we are unable to accept that ruling. If it is correct, it would appear that the entry of the name of a Hindu widow as tenant of a holding at fixed rates at the last revision of the settlement before the passing of the Agra Tenancy Act converts the holding into her *stridhan* and deprives the male collaterals of her husband of their right of inheritance. There must be a large number of cases in which a Hindu fixed rate tenant died before the revision in question leaving besides a widow either male collaterals or daughters or daughter's sons. We do not think that section 9 of the Agra Tenancy Act was intended to deprive all the heirs of a Hindu except his widow of their right in such cases. It seems to us that the words conclusive proof in the section were intended to meet the case of disputes between the landlord on one side and the holder for the time being of the tenancy on the other. The circumstance that the Legislature provided special rules of succession by section 22 of the Act for certain tenancies but said nothing about the succession to fixed rate tenancies leads to the inference that it did not intend to interfere with the personal law of succession applicable to fixed rate tenants. Nawab *Abdul Majid* contended that the effect of sections 9 and 20 of the Act is that all Hindu females recorded as fixed rate tenants at the last revision of the settlement before the passing of the Act have power to alienate their holdings to whomsoever they please. He even went so far as to say that this is generally understood to be the law. The question is of great importance. As we are not prepared to accept the decision to which we are referred, we direct that the record be laid before the learned Chief Justice with a view to this appeal being laid before a larger Bench.

Munshi *Gokul Prasad* (for Babu *Durga Charan Banerji*) for the appellants.

The name of the widow was only entered after death of Ram Narain. She had only a Hindu widow's estate. The record was only evidence of the nature of the holding as between landlord and tenant. There was no special provision prescribing the devolution of fixed rate tenancies. It followed that the general law applied. Section 22 laid down the law with reference to other kinds of tenancies. The expression 'conclusive proof' in section 9 of the Agra Tenancy Act did not apply to disputes between sharers *inter se*, it is conclusive proof of the nature of a tenancy only.

The first enactment on the point was Act X of 1859. Sections 3 and 4 contemplated suits between zamindar and tenant. Then came Act XII of 1881, sections 4 to 6. Under these Acts the Court had to make inquiries about the nature of tenancies. In 1882-3 there was a revision of permanent settlements in these provinces.

(1) Weekly Notes 1905 p. 68

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and the nature of tenancies was inquired into and recorded The present Act has made the entry conclusive, but only so far as the nature of the tenancy is concerned Section 9 deals with the rights of tenants as between them and the zamindar, not with their rights *inter se* The same view was taken by GRIFFIN, J, in an unreported case S A 26 of 1906, decided on 31st July, 1907 If the Legislature had intended suits of this kind to be barred, it would have said so, as in section 32 of the Tenancy Act The Board of Revenue also took the same view in Select Decision No 2 of 1909 where they differ from the case of *Mulai Singh* v *Rajwant Singh* (1) and agree with GRIFFIN, J

The Hon'ble *Nawab Muhammad Abdul Majid*, for the respondents, relied on the case of *Mulai Singh* v *Rajwant Singh* and the language of the section

RICHARDS, C J, and KARAMAT HUSAIN and CHAMIER, JJ —The facts which must be assumed for the purposes of this appeal are very clearly set forth in the order of reference of the learned Judges The short point for our decision is whether or not a person who was recorded in the manner stated must be deemed to have all the estate in the fixed rate tenancy vested in him or her alone, irrespective of the rights of all other persons, who under *the ordinary law would be entitled to the tenancy, but for the* fact that such a person is so recorded The defendants, who are the transferees of Musammat Rupao, rely on the provisions of section 9 of the Agra Tenancy Act That section is as follows —"Every entry at the last revision of records before the commencement of this Act recording a person as a permanent tenure holder or a fixed rate tenant, or otherwise shall, in the absence of a judicial decision to the contrary, in proceedings instituted before the commencement of this Act, be conclusive proof that such person is a permanent tenure holder or a fixed rate tenant, or not, as the case may be "

The section is certainly unfortunately worded, and *primá facie* the language of it is in favour of the defendants' contention *viz*, that Musammat Rupao must be deemed, having regard to the words of the Act, to have had the entire estate in the fixed rate tenancy, and that *their title as her transferees is*

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complete This view met with favour by the learned Judges who decided the case of *Mulai Singh* v *Rajwant Singh* (1) They say —' In our opinion the language of the section is clear and imperative "

Prior to the passing of this Act there had been somewhat similar provisions in Act X of 1859, (sections 3, 4 and 7) and Act XII of 1881 (sections 4, 5 and 6) Under those Acts it was the duty of the Court to inquire as to the nature of a tenancy which had been held at fixed rates for certain periods, and certain presumptions in favour of the tenants were provided Those sections were all intended to meet the case of disputes between the zamindar and his tenant as to the nature of the tenancy Before the passing of the Agra Tenancy Act of 1901, at the time of revision of records, inquiries were held as to the nature of these tenancies, but these again were inquiries between the zamindar and the tenant and did not touch upon the title to the tenancy itself It is admitted that fixed rate tenancies, unlike occupancy tenancies, are heritable and transferable Section 20 expressly so provides Fixed rate tenancies devolve on the death of the fixed-rate tenant according to the ordinary law If the contention of the defendants be sound, namely, that by virtue of section 9 the entry is conclusive not only between landlord and tenant but also between all persons claiming the tenancy, then it follows that if the managing member of a joint and undivided family was recorded as the fixed rate tenant, the tenancy on his death would not devolve upon the surviving members of the joint family but would go to the heirs of the member of the family (who happened to be recorded) as if the family were separate Again, if the widow or a daughter succeeded to a fixed rate tenancy on the death of a fixed rate tenant who was a Hindu, the tenancy on the death of the widow or daughter would go to the heir of the widow or daughter and not to the heirs of the last male holder It seems to us quite clear that this could not have been intended A learned Judge of this Court in Second Appeal No 26 of 1906, held that section 9 did not apply to questions as to the title to the fixed rate tenancy The same view was taken by the Board of Revenue in *Gajadhar Dasaundhi* v *Gokul Dasaundhi* (2) In our opinion

(1) Weekly Notes, 1906 p 68. (2) Select Decisions No. 2 of 1905

the decision of the court below was not correct The entry mentioned in section 9 is conclusive proof only as to the nature of the tenancy The case, however, was decided on the preliminary point, and the general merits of the case were not gone into by the lower appellate court We accordingly allow the appeal, set aside the decree of the lower appellate court and remand the case with directions that the same may be re admitted, and the learned Judge do proceed to hear and determine the same according to law Costs in this Court will be costs in the cause

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Appeal decreed—Cause remanded

PRIVY COUNCIL

P C 1912 *January* 31 *February* 1 21

PARBATI (DEFENDANT) v MUZAFFAR ALI KHAN AND OTHERS (PLAINTIFFS) AND MUZAFFAR ALI KHAN AND OTHERS (PLAINTIFFS) v PARBATI (DEFENDANT)

Two appeals consolidated

[On appeal from the High Court at Allahabad]

Mortgage—Suit for redemption of usufructuary mortgage—Defendants setting up title under sales of mortgagor s interest—Title by adverse possession—Separation of member of joint Hindu family and purchase of property with self acquired means—Possession adverse to mortgagors

These were cross appeals from the decision of the High Court in *Muzaffar Ali Khan* v *Parbati* (1) The plaintiffs relied on a usufructuary mortgage of 1846 and sued for redemption of the property in suit two shares in a village called Lohari. The case of the defendants was that they were in possession not under the mortgage but under sales of the 27th of May 1853 and the 20th of March 1854 respectively by which the equity of redemption in the shares mortgaged in 1846 had passed to those through whom they claimed title and they pleaded adverse possession Both the lower courts had upheld the later sale and dismissed the suit as to that share in Lohari As to the earlier sale the courts below had differed the first court upholding it and the High Court deciding in favour of the plaintiffs On appeals by both parties it was immaterial in the view taken by their Lordships of the Judicial Committee of that sale (27th May 1853) by what title Ashraf un nissa one of the widows of the mortgagor obtained the share she took and whether or not she had a daughter who survived him Her share was certainly transferred by the sale to Baldeo Sahai who though he was the grandson of one of the mortgagees and the son of the other with both of whom he had lived as a member of a joint Hindu family had according to reliable evidence separated from them and at the time of the sale was carrying on with a nucleus of property derived from his grandmother a money lending business from the profits of which he was enabled to purchase with self acquired funds

Present —Lord SHAW Lord ROBSON Sir JOHN EDGE and Mr AMEER ALI

(1) (1907) I L R., 29 All 640

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the share in Lohari from Ashraf un nissa, who purported to sell it to him as a person who was not a mortgagee under the mortgage of 1846 and he was therefore not precluded from setting up a title by adverse possession which it was conclusive in the evidence he had held for more than 50 years Their Lordships therefore while affirming the decision of the courts below as to the later sale reversed the decision of the High Court as to the earlier sale and upheld that transaction also

TWO consolidated appeals (30 and 31 of 1910) from a judgement and decree (13th June 1907) of the High Court at Allahabad, partly affirming and partly reversing a judgement and decree (14th July, 1904) of the Subordinate Judge of Saharanpur who had dismissed the suit

The facts will be found sufficiently stated in the report of the appeal to the High Court (SIR GEORGE KNOX, ACTING C J and DILLON, J) and also in the High Court judgement appealed from which will be found in I L R 29 All, 640

On these appeals—

Sir *R Finlay, K C*, and *B Dube* for the appellants in appeal 30 and respondents in appeal 31, contended that the plaintiffs were not entitled to recover any portion of the property covered by the mortgage of the 22nd of July 1846, that it had been proved that Ashraf un nissa had a daughter living at the time of her husband s death, and that Baldeo Sahai had acquired a good proprietary title to the one third share of mauza Lohari by virtue of the sale dated the 23rd of May 1853 and by adverse possession for more than 50 years

DeGruyther, K C, and *Cowell* for the respondents in appeal 30 and the appellants in appeal 31, contended that the mortgage-deed of the 22nd of July, 1846 was admitted and the evidence showed that it was still subsisting, that the defendants had not proved their purchases as alleged of the mortgagors interest on the 27th of May 1853 and the 20th of March 1854, and that the defendants as mortgagees could not rely on any possession as being adverse to the mortgagors during the continuance of the mortgage Reference was made to *Simbhunath Pande* v *Golap Singh* (1)

Sir *R Finlay, K C*, replied.

1912, *February 21st* —The judgement of their Lordships was delivered by SIR JOHN EDGE —

These are consolidated appeals from a decree of the High Court of Judicature for the North Western Provinces at Allahabad

(1) (1887) I. L. R 14 Calc 572 (579) L. R. 14 I A, 77 (83)

dated the 13th of June, 1907, which partly affirmed and partly reversed a decree of the Subordinate Judge of Saharanpur, dated the 14th of July 1904 by which the suit had been dismissed

The suit was brought on the 1st of September, 1903, to obtain proprietary possession of 13 biswas, 6 biswansis, 3 tanwansis 6½ kachwansis and a fraction of the 20 biswas of Mauza Lohari The plaintiffs case briefly was that one Mehdi Ali, whose representatives in title they alleged themselves to be, had in 1846 mortgaged the share in Mauza Lohari, possession of which they claimed to Sita Ram and his son Sheo Lal, that the mortgage debt had been discharged by the usufruct, and that the defendants were the representatives of the mortgagees and still held possession under no other title and the plaintiffs claimed a decree for proprietary possession and for mesne profits

The case of the defendants was that they held possession not under the mortgage of 1846 but under a private sale of the 27th of May, 1853 of 10 biswas of Mauza Lohari and under an auction sale of the 20th of March 1854, of the remaining 10 biswas of Mauza Lohari, which sales they alleged were made in order to discharge debts which had been contracted by Mehdi Ali In effect the defendants case was that by reason of the sales of 1853 and 1854 the equity of redemption in the shares which were mortgaged in 1846 passed to those through whom they claimed title It was also contended on behalf of the defendants that they were not precluded from setting up a title by adverse possession by the fact that possession of the shares in suit had been originally obtained under the mortgage of 1846

The facts as found by the Board are briefly as follows —

On the 22nd of July, 1846, *Mehdi Ali*, who owned the whole 20 biswas of Mauza Lohari borrowed Rs 4 000 from Sita Ram and his son Sheo Lal, and executed in their favour a mortgage for the term of two years of the shares which are the subject of this suit The mortgage was usufructuary and the mortgagees were put in possession under it Incidentally it may be mentioned that the Subordinate Judge found as a fact that the mortgage debt had been discharged by the usufruct before 1863 If it were necessary in this appeal to decide that issue their Lordships would probably not be prepared to dissent from that finding of the Subordinate Judge

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Mehdi Ali, who was a Shia Muhammadan, died on the 9th of January, 1852, and left surviving him two widows, Ashraf un nissa and Umda Begam, and certainly three daughters who had been born to him by Umda Begam Through one of those daughters, Askari, who subsequently married and left issue, the plaintiffs claim title It has been contended on behalf of the defendants that Mehdi Ali also left surviving him a daughter born to him by Ashraf un nissa On behalf of the plaintiffs it has been contended that Mehdi Ali left surviving him no daughter by Ashraf un nissa, and that Ashraf un nissa was a childless widow In the view which their Lordships take of this case it is immaterial whether Mehdi Ali left or did not leave a daughter surviving him by Ashraf un nissa It may, however be mentioned that after Mehdi Ali s death, for some reason which the evidence does not explain 10 biswas of Mauza Lohari were treated as the share of Ashraf un nissa and the remaining 10 biswas were treated as the share of Umda Begam and her three daughters

Mehdi Ali died heavily in debt and after his death in 1852 suits to recover debts which were due by him were brought by his creditors against Ashraf un nissa Umda Begam, and her three daughters as the representatives of Mehdi Ali, and money decrees were obtained in those suits One of those suits was brought by Sheo Lal on the 8th of July, 1852, on a bond payable on demand to recover with interest Rs 2 000 which Sheo Lal had lent to Mehdi Ali on the 29th of May, 1849 In that suit Sheo Lal obtained a decree for *Rs 2 786 5 6, principal and interest, against* Ashraf un nissa Umda Begam and the three daughters of Umda Begam, all of whom were sued as the heirs of Mehdi Ali Under that decree the 20 biswas of Mauza Lohari were attached On the 5th of May, 1853, a sale proclamation was made fixing the 20th of June 1853, as the date for the auction sale of the 20 biswas in execution of the money decree On the 19th of May, 1853 Sheo Lal, through his pleader, applied to the Court to remove the attachment in order to enable the defendants in that suit to pay the decree money by a private sale of the estate of Mehdi Ali deceased On that application the Court removed the attachment On the 27th of May, 1853, Inayat Husain acting under a power of attorney, which had been executed for that purpose by Ashraf un nissa and had been duly registered,

executed on her behalf a sale deed of 10 biswas of Mauza Lohari in favour of Baldeo Sahai son of Sheo Lal, the consideration being Rs 7,500 In that sale deed it was stated that two thirds of three suls of the 20 biswas of Mauza Lohari had been from the 22nd of January, 1846 in the exclusive possession of Sita Ram and Sheo Lal under the mortgage for Rs 4 000 of 1846 from Mehdi Ali to them and it was stated that Mehdi Ali had died, and had left a considerable amount of debt unpaid, that Ashraf un nissa had remained the heir of half the estate of Mehdi Ali in lieu of her dower debt, and in order to satisfy the decrees held by, and the debts due to Sheo Lal, she made an absolute sale of the 10 biswas share to Baldeo Sahai. It was by the sale deed agreed that Rs 2,000 of the purchase money should be left with Baldeo Sahai and that he should have power to pay the Rs 2,000 to the mortgagees and to redeem the subject of the sale In the sale deed the 10 biswas were described as Ashraf un nissa s share After that sale the 10 biswas were entered in the revenue papers as Baldeo Sahai s share by private sale Baldeo Sahai obtained possession of the 10 biswas share and held possession of the share until he died in 1895, when the defendants as his representatives obtained possession

It has been contended on behalf of the plaintiffs, first, that Ashraf un nissa had no title to the 10 biswa share in Mauza Lohari and, consequently had no title which she was capable of passing by the sale deed, and, secondly, that Baldeo Sahai was a member with his father Sheo Lal of joint Hindu family, and that the family held possession as mortgagees and could not set up a claim of adverse possession against the representatives in title of Mehdi Ali, the mortgagor of 1846

It has not been suggested that Ashraf un nissa had any interest in Mauza Lohari which she could sell other than such interest, if any, in the immovable property of Mehdi Ali as she obtained under the Shia law as his widow Her right to dower did not confer upon her a saleable estate in Mauza Lohari If she had not borne to Mehdi Ali a daughter who survived him, Ashraf un nissa as his widow took no title to any share in Mauza Lohari If on the other hand, as the defendants have contended Ashraf un nissa had borne to Mehdi Ali a daughter who survived him for a few months,

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Ashraf un nissa's share as his widow, and the share of his daughter, which on that contention came to her on the daughter's death did not together amount to a 10 biswas share in the mauza If Ashraf un nissa had any other title in 1853 to the 10 biswas share which she purported to sell to Baldeo Sahai it has not been shown what it was or how she had obtained it But it is not necessary to consider what title, if any Ashraf un nissa had to the 10 biswas share as by the sale deed of the 27th May, 1853 Ashraf un nissa sold to Baldeo Sahai such interests, if any as she had in the 10 biswas of Mauza Lohari, and Baldeo Sahai got possession of the 10 biswas and in course of time obtained a title by adverse possession to the whole 10 biswas or any portion of that share which Ashraf un nissa may not have been empowered to sell to him, and that title became indefeasible unless he or the defendants who claim under him were precluded from setting up a title of adverse possession

The High Court found as a fact that Baldeo Sahai was in 1846, and continued to be a member of the joint Hindu family of which his father Sheo Lal had been a member and on that finding of fact decided that Baldeo Sahai's possession and the possession of the defendants as his representative had always been that of mortgagees and consequently that Baldeo Sahai and those who claim under him were precluded from setting up any title of adverse possession to any portion of the share which was mortgaged in 1846 to Sita Ram and Sheo Lal Their Lordships are unable to agree with the findings of fact of the High Court upon which that decision was based At the date of the mortgage of 1846 Baldeo Sahai was undoubtedly a member of the joint Hindu family, of which Sita Ram and Sheo Lal were members and that family was governed by the law of the Benares School of the Mitakshara Their Lordships, however, find on evidence which they consider is unimpeachable that in 1847 or 1848, owing to disputes in the family, Baldeo Sahai ceased to be joint in food and joint in business with Sheo Lal, but no partition of the family property was then made and thenceforward during their lives Baldeo Sahai and Sheo Lal had been separate in food and in business Their Lordships also find that when Sheo Lal and Baldeo Sahai ceased to be joint in food and in business Baldeo Sahai received a present of a considerable sum of money from his grandmother, with which he carried on the business

of a money lender on his own account, and that out of his separate self acquired property he found the purchase money of Rs 7,500 of the sale deed of the 27th of May, 1853 The oral evidence showing a separation is in their Lordships opinion confirmed by the terms of that deed Ashraf un nissa purported to sell the 10 biswas to Baldeo Sahai as a person who was not a mortgagee under the mortgage of 1846 So far as the 10 biswas which Ashraf un nissa purported to sell to Baldeo Sahai on the 27th of May, 1853 their Lordships find that a title at least of adverse possession has been established and that the defendants are not precluded from setting up that defence

Their Lordships concur with the finding of the Subordinate Judge and the finding of the High Court that the remaining 10 biswa share in Mauza Lohari was sold to Sheo Lal on the 20th of March, 1854 at an auction sale held in execution of a decree for money which had been obtained by a creditor of Mehdi Ali, in a suit brought against Umda Begam and her three daughters as the heirs and representatives of Mehdi Ali, and Sheo Lal obtained possession and held it until he died when his interest passed to his son Baldeo Sahai as his heir

The plaintiffs failed to establish any title by way of redemption or otherwise to any interest in Mauza Lohari and their suit was rightly dismissed by the Subordinate Judge

Their Lordships will humbly advise His Majesty that the appeal of the representative in title of Baldeo Sahai be allowed with costs and the decree of the High Court be varied by dismissing the appeal to that Court with costs, and that the appeal of Saiyid Muzaffar Ali Khan and other plaintiffs to His Majesty in Council be dismissed with costs

Appeal 30 *allowed decree varied*
Appeal 31 *dismissed*

Solicitors for the appellant in Appeal 30 and respondent in Appeal 31 —*Barrow, Rogers, and Nevill*

Solicitors for the respondents in Appeal 30 and appellants in Appeal 31 —*Ranken Ford, Ford and Chester*

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BALWANT SINGH (PLAINTIFF) *v* R CLANCY (DEFENDANT) AND BALWANT SINGH (PLAINTIFF) *v* MAHARAJ SINGH (DEFENDANT)

[On appeal from the High Court at Allahabad]

Minor—Mortgage executed by minor—Money borrowed to discharge debts of father — Contract executed by minor—Effect of—

In this appeal which was one from the decision of the High Court in *Maharaj Singh* v *Balwant Singh* (1) their Lordships of the Judicial Committee on the evidence upheld that decision on the question whether the defendant Maharaj was a minor at the time he signed the mortgage and said — Having found as a fact that Maharaj Singh was a minor at that time it is not necessary for their Lordships to consider any other issue This suit has been brought on the mortgage deed of the 28th of October 1892 by the assignee of that mortgage and as their Lordships have held that the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh and as Maharaj Singh was then a minor the mortgage deed as against him and his interest in the estate was not merely voidable it was void and of no effect and must be regarded as a mortgage deed to which he was not even an assenting party and as a mortgage deed which did not affect him or his interest in the estate

TWO consolidated appeals (3 and 4 of 1910) from two judgements and decrees (27th March 1906) of the High Court at Allahabad which varied the decree (11th April, 1903) of the Subordinate Judge of Aligarh

The facts of this case are fully stated in the report of the appeal to the High Court (SIR JOHN STANLEY, C J and BURKITT, J) in the judgement of the High Court which will be found in I L R, 28 All, 510

On these appeals, of which No 3 was heard *ex parte*

DeGruyther, K C, and *B Dube* for the appellant, contended that on the evidence the respondent Maharaj Singh had attained his majority at the date of the execution of the bond in suit and the High Court had wrongly exempted him from liability on the bond on the ground of his being a minor at that time Eighteen was the age of majority by Act IX of 1875, and reference was made to an application made by Sheoraj on the 22nd of September, 1891, in which Maharaj was stated to be 19 proceedings in which he had acted as having attained his majority, in May, 1892, signing a written statement, and appointing a pleader in a suit, on the 26th of July, 1892 executing a mortgage, and on the 2nd of February, 1896, executing another mortgage in which he stated his age to be 23 all showing

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(1) (1906) I L R, 28 All 508

that he was more than 18 when he signed the bond in suit. Even if he were not a minor then he had ratified the transaction on attaining majority. But irrespective of his age, he was, by the Hindu law, under a legal obligation to discharge those of the debts in suit which were contracted by his father or brother as managing member of the joint family. The father and the two sons were members of a joint family and the two sons remained joint after the father's death; there was no evidence of any partition between them, and the presumption until there was a separation was that they were joint. If so, the obligation to discharge the father's debts arises, unless they can show that the debts were contracted for immoral purposes; and the onus was on the sons to show that. General evidence that the father was immoral or extravagant was not sufficient to relieve the sons from the liability to pay the father's debts, nor because some of the debts were contracted for immoral purposes can it be inferred that all of them were, the High Court had wrongly presumed this. Reference was made to Mayne's Hindu Law, 7th edition, 387, 388, and note (*h*) at page 389, and *Bhagbut Pershad Singh* v *Girja Koer* (1). A *bonâ fide* purchaser in execution of a decree in such a case would obtain a good title, even if it were shown afterwards that the debt in respect of which the decree was made was tainted with immorality—*Girdharee Lall* v *Kantoo Lall* (2), and the proposition applied equally to the case where the property was attached in execution of a decree, and the money was borrowed to relieve it from attachment.—*Suraj Bunsi Koer* v *Sheo Persad Singh* (3). [Sir *John Edge* referred to *Nanomi Babuasin* v *Modhun Mohun* (4).] That question had been dealt with in *Pem Singh* v *Partab Singh* (5), *Debi Dat* v *Jadu Rai* (6) and *Chintamanrav Mehendale* v *Kashi Nath* (7). The Transfer of Property Act (IV of 1882) section 59, and as to admissibility of documents in evidence, Evidence Act (I of 1872), sections 34, 47, 68 and 70 were referred to. There was no question of

(1) (1888) I L R 15 Calc, 717 (723 724) L. R. 15 I A 99 (103 104)
(2) (1874) L. R. 1 I A., 321 (323 325 331 333)
(3) (1879) I L R 5 Calc 148 (165, 168 174) L R 6 I A 88 (101 104 107)
(4) (1885) L R 13 I A 1 I L R. 13 Calc 21
(5) (1893) I L R. 14 All 179
(6) (1902) I. L R. 24 All. 459
(7) (1889) I L R 14 Bom, 320 (327)

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BALWANT SINGH v. R. CLANCY

limitation here on the case made out in the pleadings and evidence It was submitted that the judgement of the Subordinate Judge *should be restored*

Sir *Erle Richards, K C*, and *Kenworthy Brown* for the respondent, Maharaj Singh, contended that he was not bound by the mortgage sued upon, first, on the ground that he was a minor when *he executed it, and against him it was therefore void* The evidence, it was submitted, showed that he was born on the 20th of December, 1874, and at the date of the mortgage (28th October, 1892) he had therefore not attained his majority The appeal therefore failed as the deed could not be used in any way against Maharaj Singh. Secondly Sheoraj was not the manager of the joint family In the courts below that question was not raised either in the pleadings or the issues Sheoraj s act could not bind Maharaj He was not in fact manager, nor did he purport to act as manager in the matter of borrowing the money He represented himself to be the owner of an impartible estate, and it was in that character the Bank gave him credit, and accepted his security for the loan Moreover, a large proportion of the debts could be traced to immorality, and *the debts of the respondent s father were barred by limitation before* institution of the present suit The Bank, so far as appears from the evidence, made no inquiries and did not deserve any consideration.

DeGruyther, K C, replied citing *Oahud Buksh* v *Bindoo Bashinee Dossee* (1) as to the authority of an elder brother to sell property for payment of debts, *Succaram Morarji Shetay* v *Kalidas Kallianji* (2) as to the power of a widow in a like case where there are minor sons, and *Sayad Muhammad* v *Futteh Muhammad* (3) and *McLean* v *McKay* (4), as to the discretion of the Privy Council in deciding a case on the merits without too strictly regarding the terms of the pleadings

1912 *February 28th* —The judgement of their Lordships was delivered by SIR JOHN EDGE —

These are two consolidated appeals from decrees of the High Court of Judicature for the North Western Provinces at Allahabad, dated the 27th of March, 1906 which varied a decree of the Subordinate Judge of Aligarh, dated the 14th of April, 1903

(1) (1867) 7 W R C R 293

(2) (1894) I L R, 18 Bom 631

(3) (1894) I L R., 22 Calc 324; L R 22 I A., 4

(4) (1873) L. R., 5 P C., 327 (337)

The suit in which these appeals have arisen was brought on the ith of September 1901 by the assignee of a mortgage to recover ₹ 5 67,978 8 0 principal and interest, claimed under the deed of ortgage The mortgage deed which is dated the 28th of October, 392 purports to have been made between Raja Sheoraj Singh ahadur, mortgagor, of the first part Maharaj Singh, the only other of the said Raja Sheoraj Singh of the second part, and the ank of Upper India, Limited of the third part Sheoraj Singh id Maharaj Singh were, with others, made defendants to the suit

Sheoraj Singh was the sole mortgagor, and, by the deed of mort age, Sheoraj Singh, declaring that he was the absolute owner in ossession of the several villages lands hereditaments and pre ises in the deed mentioned and that there was no sharer in the ud property purported to mortgage the property to the Bank of Upper India, Limited as security for the repayment with interest f Rs 3 00,000 lent to him by the Bank Maharaj Singh was not a iortgagor, nor did it appear by the mortgage deed that he had any roprietary interest in the mortgaged property or was obtaining ny benefit from the loan to his brother Sheoraj Singh, Maharaj Singh was made a party to the deed of mortgage in order that the act of his having signed the deed might afford evidence that he ad assented to the taking of the loan by Sheoraj Singh and the ranting of the mortgage The suit is one for sale of the property ientioned in the mortgage deed, and by the suit the plaintiff sought o make Maharaj Singh personally liable for the mortgage debt nd interest and to bring to sale Maharaj Singh s share in the nortgaged property which in fact, was the ancestral property of he joint Hindu family which at the date of the mortgage consisted of Sheoraj Singh and Maharaj Singh The mortgage was assigned on the 2nd of August 1897, by the Bank of Upper India, Limited, o Raja Balwant Singh, who was the plaintiff in the suit Raja Balwant Singh is now dead, and his minor son Raja Surajpal Singh, is represented in this litigation by the Collector of Etah, who is in charge of his estate

Sheoraj Singh, the mortgagor, is the elder of the two sons of Raja Shankar Singh, now dead The younger of the two sons of Raja Shankar Singh is Maharaj Singh a defendant in the suit, and the respondent in one of these two appeals Raja Shankar Singh

was the only son of Raja Dilsukh Rai, long since dead. At the time of the Indian Mutiny of 1857 58, Dilsukh Rai, who was then a patwari, did good and meritorious service for the Government. In recognition of those services the Government granted to Dilsukh Rai a considerable estate now said to produce annually some Rs 50 000 gross income The lands granted to Dilsukh Rai were not granted as an impartible estate *They are the lands which* were mortgaged by Sheoraj Singh to the Bank of Upper India, Limited In further recognition of his services the Government conferred upon Dilsukh Rai the title of Raja as a personal distinction Raja Dilsukh Rai was a saving and apparently a penurious man On his death the estate was unincumbered, and he left a large sum of money which he had accumulated. The Government also conferred upon Shankar Singh the title of Raja as a personal distinction The title was never made hereditary, and although *Sheoraj Singh was described in the mortgage deed as a Raja he* was not entitled to be so described Raja Shankar Singh borrowed considerable sums of money, and died on the 24th of August, 1891, leaving debts which he had contracted undischarged. It was to discharge those debts of Raja Shankar Singh and also some debts which had been contracted by Sheoraj Singh, that the mortgage on which this suit has been brought was made by Sheoraj Singh

Several issues were raised and tried in the Court of the Subordinate Judge One of those issues arose on a defence of Maharaj Singh that at the date of the mortgage he was under the age of 18 years, and being at that date a minor was legally incapable of entering into any contract or of binding himself or his interest in the estate by his execution of the deed of mortgage as an assenting party to the taking of the loan and the granting of the mortgage by Sheoraj Singh Another issue which was tried by the Subordinate Judge related to an alternative case which the plaintiff put forward, by which he sought to make Maharaj Singh and his interest in the estate liable for the payment of the money due under the mortgage, on the alleged ground that it was his duty as a Hindu son to pay with interest the money advanced by the Bank of Upper India, Limited, to Sheoraj Singh, as that money had been lent by the Bank to Sheoraj Singh to discharge the debts which had been contracted by Raja Shankar Singh and had been applied

by Sheoraj Singh to the discharge of those debts On behalf of Maharaj Singh it was alleged in answer to the plaintiff's alternative case that Raja Shankar Singh had contracted those debts for the purposes of immorality and it was consequently contended that there was no duty on his sons to discharge them by payment and that the payment of those debts by Sheoraj Singh out of money lent to him by the Bank of Upper India, Limited, for that purpose, created no liability on Maharaj Singh or his interest in the family estate

The Subordinate Judge found as a fact that at the date of the mortgage the 28th of October, 1892, Maharaj Singh was of full age, and being apparently under the impression that in obtaining the loan from the Bank of Upper India, Limited, and in making the mortgage Sheoraj Singh might be regarded as having acted as the manager of the joint Hindu family, the Subordinate Judge dealt with the plaintiff's alternative case and found that it was not proved that the debts which had been contracted by Raja Shankar Singh had been contracted for the purposes of immorality, and exempting certain portions of the property which were held by persons who are not parties to either of these appeals, made a decree for sale of the rest of the property mentioned in the deed of mortgage With the portions of the property which were exempted from sale these appeals are not concerned From that decree of the Subordinate Judge Maharaj Singh and another defendant, the Reverend J B Thomas, who is now represented by the Reverend Rockwell Clancy, filed separate appeals in the High Court. The High Court on a careful and exhaustive review of the evidence found as a fact that Maharaj Singh was a minor on the 28th of October 1892, and consequently that the mortgage deed as against him and his interest in the estate was void Although the High Court obviously considered that an inquiry into the origin and nature of the debts which had been contracted by Raja Shankar Singh was irrelevant in this suit, the High Court reluctantly, and only in view of the question possibly becoming material in an appeal from their decree, carefully considered the evidence bearing on that question, and found as a fact that the debts which Raja Shankar Singh had contracted had been contracted by him for the purposes of immorality The High Court allowed the appeal of Maharaj

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Singh, dismissed the suit so far as Maharaj Singh and his interests in the estate were concerned and by a separate decree allowed the appeal of the Reverend J B Thomas to the extent of a moiety of the property claimed by him From those decrees of the High Court these consolidated appeals have been brought In support of the appeal in which the Reverend Rockwell Clancy is a respondent no argument has been addressed to their Lordships to show that the appeal against the decree of the High Court which was passed in the appeal of the Reverend J B Thomas could be supported if the appeal against the decree obtained by Maharaj Singh in the High Court should fail

Some of the questions which had been considered in the Courts below were on behalf of the appellant argued at considerable length before this Board and it was also contended on his behalf that in borrowing the Rs 3,00 000 from the Bank of Upper India, Limited and in making the mortgage of the 28th October, 1892, Sheoraj Singh had acted as the manager of the family, and for the benefit and protection of the estate, and consequently, as it was urged, that it was immaterial whether Maharaj Singh was or was not of full age at the date of the mortgage It will be convenient to deal with that contention at once The contention that Sheoraj Singh had acted as the manager of the family in borrowing the Rs 3 00,000, and in making the mortgage, is unfounded. Evidence, *oral and documentary, which their Lordships accept as reliable,* proves that Sheoraj Singh after the death of his father Raja Shankar Singh, assumed without authority the title of Raja, and asserted that the family estate was impartible, and as an impartible estate had descended to him as the elder son of Raja Shankar Singh and that his brother Maharaj Singh was entitled only to an allowance for maintenance It was in that assumed position as the absolute owner of an impartible estate and not as manager of a joint Hindu family, that he obtained the loan from the Bank of Upper India, Limited, and made the mortgage in favour of the Bank The mortgage deed was drawn up by an official of the Bank and in that *deed Sheoraj Singh is described as Raja Sheoraj Singh Bahadur,* mortgagor, and it is recited that—

the said mortgagor is the absolute owner or proprietor of the several villages lands hereditaments and premises hereinafter mentioned and more particularly described in the schedule hereto attached and intended to be hereby

mortgaged in possession free from all incumbrances save and except being mortgaged and under attachment of decrees as mentioned hereinafter and the said Maharaj Singh brother of the said mortgagor has been made a party to this indenture in order to make known his consent and approval to this loan being taken, and the said village lands hereditaments and premises being mortgaged as security for the same and the said mortgagor doth hereby declare that the said property is absolutely his own and he has full power to alienate the same by a mortgage sale or otherwise and that he has only one brother the said Maharaj Singh and no sons or any sharer in the said property "

In face of that deed it cannot be contended that the Bank of Upper India Limited lent the money to Sheoraj Singh or that Sheoraj Singh made the mortgage in favour of the Bank as manager of the joint Hindu family which consisted of himself and Maharaj Singh. The Bank of Upper India Limited made some inefficient inquiries and lent the Rs 3,00,000 to Sheoraj Singh, not as the manager or even as a member of a joint Hindu family, but in his assumed position as the absolute owner of an impartible estate Sheoraj Singh on his own behalf and in his own interests, and not as representing Maharaj Singh, discharged the debts which Raja Shankar Singh had contracted It need hardly be observed that Sheoraj Singh was not an ancestor or a predecessor of Maharaj Singh, he was at the date of the mortgage merely a co sharer with his brother Maharaj Singh in the property of the joint Hindu family of which they were members

The evidence on the question of Maharaj Singh's age on the 28th of October, 1892, is partly oral and partly documentary According to the evidence, oral and documentary, which the High Court considered to be entirely reliable Maharaj Singh was born on the 20th of December, 1874 and consequently was under the age of 18 years on the 28th of October 1892 The Subordinate Judge had treated the oral evidence that Maharaj Singh had been born on the 28th of October, 1874, as the false evidence of perjured witnesses, and had treated the documentary evidence as fabricated on behalf of Maharaj Singh for the purposes of his defence to the suit Before coming to the conclusion that Maharaj Singh was born on the 20th of December, 1874, the High Court bearing in mind the adverse comments of the Subordinate Judge on that oral and documentary evidence, and with the object of ascertaining how far, if at all, the comments and findings of the Subordinate Judge were justified had carefully considered the oral evidence of the witnesses, and had

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examined the documents and papers which had been put in evidence There was some other documentary evidence which standing alone and unexplained would suggest that Maharaj Singh had probably arrived at the full age of 18 years before the 28th of October, 1892

The oral and documentary evidence upon which the High Court relied for their finding that Maharaj Singh was a minor when he signed the mortgage deed on the 28th of October, 1892, has been criticised minutely and at length by the learned counsel who argued these appeals on behalf of the appellant but their Lordships are unable to see any reason for doubting, on the question of the date of birth of Maharaj Singh, the evidence of Pandit Ganesh Ram, Pancham Ram, Jhamman Lal, Ram Prasad Ganesha Ram the barber, and the defendant respondent Maharaj Singh. If the evidence of those witnesses is believed Maharaj Singh was born on the 20th of December, 1874 The documentary evidence as to the date of birth of Maharaj Singh is in their Lordship s opinion not open to suspicion Pandit Ganesh Ram proved that he prepared the *tewa* or abstract horoscope on the day when Maharaj Singh was born, and from it prepared the horoscope which was presented to Raja Dilsukh Rai on the day of the *daston* ceremony The *tewa* and the horoscope were put in evidence The horoscope bears upon it in the writing of Raja Dilsukh Rai the name Maharaj Singh which Raja Dilsukh Rai gave to his grandson at the *daston* That horoscope was produced and examined on the occasion of the marriage of Maharaj Singh, and it has been clearly and amply identified as the original horoscope relating to the birth of Maharaj Singh. Ram Prasad who with other pandits was called in on the birth of Maharaj Singh to prepare a horoscope, produced the almanac in which at the time he had entered the birth of a son in the house of Kunwar Shankar Singh under the date 12th Aghan Sudi Sambat 1931 which was the 20th of December, 1874 Ganesha who was the family barber took the news of the birth of a son of Shankar Singh, from Bilram to Raja Dilsukh Rai at Etah and received from him a present of Rs 2 Ganesha also said in his evidence that on that occasion Raja Dilsukh Rai gave Rs 50 to Balwant Singh for household expenses The original accounts of the expenditure of Raja Dilsukh Rai, which according to the evidence bear his signature, on the occasions when he examined them, show

at in December, 1874 Rs 2 were given to Ganesha barber, who ought the news of the birth of a son in the house of Kunwar hib who was Raja Shankar Singh and which show that Rs 50 is sent to Bilram on account of the birth of a on in the hou e of anwar Singh who was Raja Shankar Singh Ganesha the bar r, proved that that son was Maharaj Singh and there is no evi nce to show that Raja Shankar Singh ever had more than two ns Their Lordships cannot regard that oral and documentary idence as false or even as open to suspicion In their opinion it nclusively proves that Maharaj Singh was a minor when he signed e mortgage deed on the 28th of O tober, 1892 There is, however, cumentary evidence that prior to the 28th O tober, 1892 Maharaj ngh had acted as if he was of full age For instance, on the 26th May 1892 Maharaj Singh signed a vakalatnama appointing uhammad Tahir Husain, a pleader as his attorney in a suit in which and Sheoraj Singh were defendants, and authorizing Muhammad ahir Husain to appear for him, to file documentary evidence and refer the matter to arbitrators or to enter into a compromise In at suit Sheoraj Singh in his written statement of the 26th of May 92 made an allegation in reference to section 444 of the Code of vil Procedure which can be construed only as meaning that Maharaj ngh was at that date a minor For another instance, in a suit in hich Sheoraj Singh and Maharaj Singh were plaintiffs they, on e 13th of August, 1892, signed a vakalatnama appointing Muham ad Tahir Husain pleader, their attorney, and authorizing him to t for them in the suit On the other hand, on the 19th of August, 92, a decree was made in a suit which had been instituted on the th of July, 1892 and in which Maharaj Singh had been treated roughout as a minor under the guardianship of his brother Sheoraj ingh It is probable that until it became necessary in this suit to certain the actual date of the birth of Maharaj Singh, neither he or Sheoraj Singh knew his precise age However that may ave been their Lordships find as a fact on the clear and reliable vidence to which they have referred that Maharaj Singh was a inor under the age of 18 years when he signed the mortgage eed of the 28th of October, 1892

Having found as a fact that Maharaj Singh was a minor on the 8th of October, 1892, it is not necessary for their Lordships to

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consider any other issue This suit has been brought on the mortgage deed of the 28th of October, 1892 by the assignee of that mortgage, and as their Lordships have held that the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh and as Maharaj Singh was then a minor, the mortgage deed as against him and his interest in the estate was not merely voidable, it was void and of no effect and must be regarded as a mortgage deed to which he was not even an assenting party and as a mortgage deed which did not affect him or his interest in the estate

Their Lordships will humbly advise His Majesty that the decrees of the High Court be affirmed and these appeals be dismissed with costs

Appeal dismissed

Solicitors for the appellant —*Pyke, Parrott & Co*

Solicitor for the respondent Maharaj Singh —*Douglas Grant*

J V W

1912
January 15

APPELLATE CIVIL

Before Sir Henry Richard Knight Chief Justice and Mr Justice Banerji

GOPI NARAIN AND OTHERS (DEFENDANTS) v KUNJ BEHARI LAL (PLAINTIFF) AND SHEO DAYAL (DEFENDANT *

Act No II of 1882 (Indian Trusts Act) section 8 —Trust —Trustee entering into dealing in which his own interest may come into conflict with his duty as trustee—Purchase of mortgage deed comprising property belonging at the time of purchase to the trust

A member of a body of trustees purchased for a very low price at an auction sale in execution of a simple money decree held by the trustees as such a mortgage bond comprising amongst other property a village of which two-thirds had been *previously purchased by the author of the trust and formed part of* the trust property Neither the purchaser nor the trustees had obtained the leave of the court to bid The auction purchaser claimed the purchase for himself and sought to enforce the mortgage by suit

Held that the auction purchaser could not be allowed to do this but must on the contrary be taken to have made the purchase for the benefit of the trust. All that he was entitled to was to be repaid the actual sum which he himself paid for the mortgage deed at the auction sale.

THE facts of this case were as follows —

One Fateh Chand on the 19th of June 1887, executed a mortgage in favour ostensibly of Abdul Kafil, but really in favour of

* First Appeal No 134 of 1910 from a decree of Pitambar Joshi Subordinate Judge of Mainpuri dated the 8th of February 1910

Abdul Jalil, a p'eader of Cawnpore The property mortgaged compri ed three villages – Pali Kalan Pali Khurd and Sadikpur The mor gag money wa Rs 50 000 carrying interest at 14 annas per cent p r mensem One third in ea h of the villages had been so'd in dis harge of prior debt

Two thirds of Pali Kalan was purchased by one Gaya Prasad in exe ution of a simp'e money decree on the 31st of May 1896

O the remaining villages one Abdul Hamid purchased two thirds of Pali Khurd in exe ution al o of a simp'e money decree on the 20th of July 1892 and the third village Sadikpur, was purchased by one Sheo Dayal on the 20 h of December, 1906, also in execution of a simp'e money de ree

Gaya Prasad died on the 16th of July 1899 leaving a will, dated the 13th of July 1899 By tha will he bequeathed the bulk of his property to certain charities subject to certain legacies The trustees under tha will were Kunj Behari Lal as vice president and Gopi Narain as pre ident of the board of trustees and four other persons Kunj B hari Lal was also one of the legatees under the will

The mortgagee rights under the mortgage deed of 1887, were so'd in exe ution of a money de ree he'd by the trustees as repre sen ing the estate of Gaya Prasad against Abdul Jalil and pur chased by Kunj B hari Lal on the 24th of January 1905, or rather by one Sheo Prasad who after the comp'etion of the sale, gave out that he had been bidding for the p'aintiff

Kunj Behari Lal claimed that he made the purcha e for himself and brought the present suit for sale of the property com prised in the mortgage The court of first instan e decreed the claim

This was an appeal by the trustees other than the p'aintiff and Abdul Hamid, Sheo Dayal having submitted to the de ree of the lower court

The Hon ble Pandit *Moti Lal Nehru* (with him Dr *Tej Baha dur Sapru* and Mr *Jagmohan Nath Chak*) for the trustees other than the p'aintiff —

The trustees intended to purchase the property for the estate and had applied for leave to bid The p'aintiff himself being one of the decree-holders could not bid and would have required leave of

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court It did not appear that leave was granted Even if there was no dishonesty on the part of the plaintiff, every benefit he acquired was for the estate He could not put himself in a position where his interest might conflict with that of the estate It did not matter if there was nothing suspicious about it The law is extremely jealous on the point, the principle is that a trustee should not be exposed to the temptation of benefiting himself at the expense of the *cestui que trust* Lewin on Trusts, 11th edition, p 304 Williams on Executors 10th edition Vol II, p 1488 Coote on Mortgages, 7th edition Vol II, p 841 The same principle was enunciated in Story on Equity Jurisprudence, Grigsby s edition, p 211, and Pomeroy Equity, Vol III p 2079, and the principle was the same as in the leading case of *Keech* v *Sandford* (1) which was followed in *Griffin* v *Griffin* (2)

So long as the relation subsisted and was of a fiduciary nature it did not really matter whether the property was the subject of trust or not *Darcy* v *Hall* (3)

Section 88 of the Trust Act dealt with trustees and covered the entire ground The English cases only laid down the principle which was embodied in that section The leading case was that of *Ex parte Lacey* (4) which was followed in *Lagunas Nitrate Co* v *Lagunas Syndicate* (5)

It was to the interests of the mortgagee to have the property sold, whereas as a mortgagor, it was the duty of the plaintiff to show that the mortgage was a bad one and Fateh Chand had been imposed upon A case where a purchase by a trustee was held good was that of *Barwell* v *Barwell* (6) which shows the steps he must take before a purchase by him can stand

Maulvi *Muhammad Ishaq* (for *Abdul Hamid*) for the other defendant appellants adopted the argument of the advocate for trustees

Mr *B E O Conor* (with him Maulvi *Ghulam Mujtaba* and Pandit *Baldeo Ram Dave)* for the respondent argued that consideration had passed and that there was nothing to restrict Fateh

(1) (1721) Sel Ch Ca 61 15 Ruling Cases p 455

(2) (1804) 1 Sch and Lef 354 9 R. R., 51

(3) (1682) 1 Vern 49 23 R R, 304

(4) (1802) 6 Ves 625 6 28 31 R R 1228

(5) [1899] 2 Ch 44

(6) (1865) 34 Beav., 371; 65 R. R., 678

Chand's right of alienation The plaintiff could not be debarred from bidding in his personal capacity at a sale brought about by a body of persons of whom he was one The effect of authorities was summed up rather widely in Lewin The view of the other side went beyond provisions of the Indian Trusts Act The essence of them was that the person holding a fiduciary position "should not avail himself of that character to benefit himself The English cases did not apply Here he must not take advantage of his fiduciary position The question had only reference to Pali Kalan which was the trust estate and not the other two villages

RICHARDS C J and BANERJI, J —This appeal arises out of a suit on foot of a mortgage dated the 19th of June 1887 The mortgagor was one Fateh Chand and the mortgagee was one Abdul Kafil The mortgage was for Rs 50,000 at 14 annas per cent per mensem interest. It is clear now that Abdul Kafil was not the real mortgagee but was only *benamidar* for one Abdul Jalil, a pleader in Cawnpore This mortgage was subsequently attached and sold in execution of a simple money decree which Gaya Prasad had obtained against Abdul Jalil and which was being executed against the representatives of the latter The certificated auction purchaser of this mortgage was Babu Kunj Behari Lal, the plaintiff in the present suit This bond has been the subject of a good deal of litigation which, in the view we take of the case it is not material to refer to It was made as already stated, by Fateh Chand in favour of his pleader and one of the defences taken in the present suit is the plea that there was no consideration for the bond. The bond no doubt was of a very suspicious nature made as it was in favour of the pleader of Fateh Chand Fateh Chand was a man who managed to dissipate what must originally have been an estate of considerable value and had the suit been one between Fateh Chand and Abdul Jalil we might have had great difficulty in holding that anything like the full principal sum of Rs 50 000 was due We think however, for reasons which we shall presently state, that the defendants appellants in the present appeal cannot be allowed to say that the bond was not for its full face consideration Three villages were mortgaged one called Pali Khurd another called Pali Kalan, and third called Sadikpur A one third share in each of these villages has been sold in satisfaction of prior mortgages but two-thirds of Pali

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Khurd was purchased by the defendant Abdul Hamid and two thirds of Pali Kalan was purchased by Gaya Prasad both in execution of simple money decrees Sidikpur was purchased by Sheo Dayal The price paid for Pali Khurd by Abdul Hamid must clearly have been based upon the property being subject to a heavy incumbrance In a written statement by Abdul Hamid in certain litigation between one Sheo Prasad and himself and others he expressly admitted that at the sale of this property the mortgage of the 19th of June 1887, was proclaimed and that he purchased the property subject to that mortgage Pali Kalan was also purchased at a price which would have been an absurdly low value unless the property was subject to a heavy incumbrance After the death of Gaya Prasad the defendants Gopi Narain and the other trustees (who are the defendants appellants and are hereinafter referred to as 'the trustees") in their application for probate of the will of Gaya Prasad placed a very small value on the property and expressly stated that it was subject to this mortgage for Rs 50 000 and interest Neither the trustees nor Abdul Hamid have given any affirmative evidence of the want of consideration Under these circumstances we think that the decision of the learned Subordinate Judge that the bond had been given for full consideration must be accepted.

It is now necessary to state some further facts upon which the other pleas taken in the suit are based Gaya Prasad was a man possessed of considerable wealth. He made a will on the 13th of July, 1899 and thereby appointed certain persons to be his trustees and amongst them the plaintiff in the present suit Kunj Behari Lal He named as president of the board of trustees the defendant appellant Gopi Narain and the respondent Kunj Behari Lal selected by his co trustees is vice president of the board Under the will of Gaya Prasad both Kunj Behari Lal and Gopi Narain took considerable benefits After some litigation the will was duly proved and it was at the instance of the trustees that the decree already mentioned against Abdul Jalil was being executed against the latter's widows It must be borne in mind that the trustees were at the time of the execution of decree in possession of the village of Pali Kalan under the will of Gaya Prasad and that the mortgage which was attached in execution of the decree against Abdul Jalil affected this village as well as the other two villages already

mentioned The trustees executed a power of attorney on the 30th of January 1900 in favour of Kunj Behari Lal This document will be found at page 75 of the appellants book It sets forth that the trustees other than Kunj Behari Lal have other engagements and have no time to attend court in a body and look after and contest cases and they then proceed to appoint Kunj Behari Lal their general attorney, to act for them in all court matters, he was not, however empowered to purchase or take property in mortgage or borrow money in their names On the 7th of January, 1905, Kunj Behari Lal wrote to Gopi Narain as president of the committee, a letter which will be found at page 45 of the respondents book In this letter he points out that the mortgage of the 19th of June 1887, would be sold on the 24th of January 1905, and that in his opinion it would be most advisable for the trustees to purchase this bond. He says in the letter — If any stranger purchases this village and is successful in his suit the whole of the share in mauza Pali Kalan will be lost He says further that if the trustees do not buy the bond, he himself would do so No one can doubt the soundness of the advice given in this letter Granted that the bond was a little shady and that some claim was being made to it by the widows of Abdul Jalil it was still most advisable to purchase it Kunj Behari lived at Etawah the other trustees lived at Cawnpore In the ordinary course of events the letter would reach Gopi Narain about the 8th of January and on the 10th of January an application was made in the execution case that the trustees should be permitted to bid for the bond of the 19th June, 1887, which was to be sold in execution of Gaya Prasad s decree The will of Gaya Prasad provided for the holding of meetings of the trustees at stated times, and in the letter of Kunj Behari Lal to which we have already referred, he suggested that an extraordinary meeting of the committee should be called to consider the question of purchasing the bond. It appears from the evidence that a notice of a meeting was sent out and that on the agenda the question of the purchase of the bond was expressly mentioned It also appears that there was no quorum at the meeting which was summoned for the 22nd of January that is to say, two days before the sale It therefore appears that there was no express resolution on the part of the trustees on the subject of the purchase of the bond Kunj Behari Lal attended the sale

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GOPI NARAIN v KUNJ BEHARI LAL

He never obtained any express leave on his own account to bid at the sale, although undoubtedly he was one of the decree holders It does not appear from the evidence whether any order was made on the application of the trustees for leave to bid, and strictly speaking Kunj Behari Lal had no right to bid at the sale either on his own behalf or on behalf of the trustees without leave of the court, but he nevertheless attended the sale and it appears that he and one Sheo Prasad bid at intervals from the commencement of the sale, and that the last bid was made by Sheo Prasad We may here mention that Sheo Prasad was also a general attorney for the trustees He was also attorney for Kunj Behari Lal The bond was knocked down for the sum of Rs 3,115 Kunj Behari Lal was examined and he states that the purchase was made by Sheo Prasad for him, that he had not money with him and that he borrowed it from Gopi Narain Gopi Narain lent him the money not out of the trust fund but out of private moneys of his own and the amount was subsequently repaid to him He says also that after he had purchased the document that is to say the bond in question Gopi Narain asked him to give the document to the committee and I said that I would not give it A number of the notices issued for the subsequent meetings of the trust committee have been put in evidence and these show that time after time amongst the list of business to be transacted is the question of the purchase of the bond but no resolution was ever come to on the subject either by the trustees to surrender any rights they might have or for the taking of any steps against Kunj Behari Lal The matter finds a place in the agenda for the last time in the notice, dated the 2nd of July 1905 Kunj Behari Lal did not obtain a sale certificate for some three years after the date of purchase and in the meantime the bond had been claimed by the widows of Abdul Jalil In our opinion the inference to be drawn from the evidence is that Kunj Behari bid for the bond in the first instance possibly with the intention of allowing the trustees to have the benefit of it. It is equally possible that when he found that before the sale the trustees had come to no resolution he bid for the bond on his own behalf intending to keep it for himself We do not believe that the trustees as a body ever intended that Kunj Behari Lal should purchase the bond for himself and we are satisfied that they never gave him such permission The application for leave to bid strongly

suggests that the trustees at once saw the soundness of the advice given them by Kunj Behari Lal, namely, that it would be advantageous to purchase the bond We are satisfied also that after the purchase had been made they would have been glad to take over the purchase from Kunj Behari Lal This is shown by the fact that time after time the question of the bond is placed upon the agenda of the meetings of the trustees, and also by the fact that Gopi Narain asked Kunj Behari Lal to let the trustees have the bond. We think that it is most probable that Kunj Behari Lal having succeeded in getting the property knocked down to him or to his attorney at a very low price, determined to keep it himself, and that the trustees thought they could not compel him to give it up *Kunj Behari Lal was probably supposed to know more of court* matters than his co-trustees and they considered that they were at his mercy

The question then arise , can Kunj Behari Lal under those circumstances retain the benefit of his purchase? We are of opinion that he cannot Section 88 of the Indian Trusts Act provides —'Where a trustee executor partner, agent, director of a company, legal adviser or other person bound in a fiduciary character to protect the interests of another person, by availing himself of his character, gains for himself any pecuniary advantage or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage he must hold for the benefit of such other person, the advantage so gained' Illustration (*h*) is as follows —' A, a guardian, buys up for himself incumbrances on his ward B s estate at an under value A holds for the benefit of B the incumbrances so bought and can only charge him with what he has actually paid This section incorporates and codifies the law which prevails in England on the subject of purchases made by trustees The authorities will be found collected in Lewin on Trusts, page 304 11th Edition Williams on Executors page 488, 10th Edition, and Coote on Mortgages, Vol II, page 841

In the present case Kunj Behari Lal purchased for Rs 3 115 a mortgage for Rs 50 000 and the value of two thirds of the village Pali Kalan if unincumbered must have been over Rs 25 000 He

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GOPI NARAIN v. KUNJ BEHARI LAL

was not only one of the co trustees and therefore bound to do all in his power to protect the interests of the trust estate, but he was also the general attorney of the trustees It seems to us that when he made the purchase of this incumbrance, he must be held to hold it for the benefit of the trust and can only charge the trust with the amount which he actually paid for it The case seems to us to fall within the second part of section 88 of the Indian Trusts Act It is quite clear that his interests as purchaser of this bond were or *might be adverse to the interests of the trust estate as owner of the* equity of redemption in the village of Pali Kalan The mortgage, however, affected not only the village of Pali Kalan but also the village of Pali Khurd and Sadikpur, and the plaintiff therefore is entitled to a decree against the purchaser of Pali Khurd, that is, Abdul Hamid, and against the purchaser of Sadikpur, but his decree against these villages must only be for the proportion which they ought to bear, having regard to the value of these villages as compared with that of Pali Kalan These two villages formed no part of the trust estate As against the village of Pali Kalan, the suit must be dismissed upon the terms that the trustees do pay to the plaintiff that portion of the price paid by him for the purchase of the bond which is proportionate to the value of the village Pali Kalan as compared with the value of the two other villages He should get the said amount of the purchase money together with interest at the rate of 10½ per cent per annum the rate fixed in the bond If the defendants, trustees, fail to pay such sum the decree of the court below should stand. The parties have agreed as to the respective values of the three villages, and we are thus enabled to fix the amount for which the decree ought to be made against the villages of Pali Khurd and Sadikpur in the event of the defendants *trustees* paying the apportioned amount of the price paid by Kunj Behari and interest, and we are also able to fix the proportionate amount of such price By agreement this price with interest up to the date fixed for payment, namely, the 24th of March, 1912, amounts to Rs 2 260 We accordingly modify the decree of the court below as follows In the event of the trustees paying into court the sum of Rs 2,260 as aforesaid, the other defendants, viz. Abdul Hamid and the heirs of Pathak Sheo Dayal, shall pay to the plaintiffs on or before the 5th of July, 1912, the sum

of Rs 50,327 10 9 (i e Rs 38,272 principal and Rs 12,055 10 9 interest up to the aforesaid date) together with costs in both courts and future interest at 6 per cent per annum but in the event of the said defendants Abdul Hamid and the heirs of Sheo Dayal not paying the said sum of Rs 50,327 10 9 together with costs and future interest as aforesaid a two thirds share of Pali Khurd, pargana Bharthana district Etawah and mahal Rani Indumati of mauza Sadikpur pargana Bharthana district Etawah, shall be sold In case the trustees do not pay the said sum of Rs 2,260 as aforesaid all the defendants shall pay to the plaintiff on or before the 5th of July, 1912, the sum of Rs 85,475, (i e, Rs 65,000 principal and Rs 20,475 interest up to the date above mentioned) together with costs in both courts and future interest at 6 per cent per annum. On failure by the defendants to pay the said amount on or before the date above mentioned the plaintiff will be entitled to bring to sale Mahal Gopi Narain of mauza Pali Kalan pargana Bharthana district Etawah and mahal Rani Indumati of mauza Sadikpur, pargana Bharthana, district Etawah and two thirds of mauza Pali Khurd, pargana Bharthana district Etawah In the event of the trustees paying the said sum of Rs 2,260 they will have their costs in the court below and in this Court to be paid by the plaintiffs but in calculating the costs of the trustees in this Court they will only be allowed one third of the costs of translating and printing

Decree modified

1912 January 29

Before Mr Justice Sir Harry Griffin and Mr Justice Chamier

KHADIM HUSAIN (PLAINTIFF) v BHARAT SINGH AND ANOTHER (DEFENDANTS) *

Act No XVI of 1908 (Indian Registration Act) sections 36 73 77—Registration—Refusal by Sub Registrar to register—Appeal to Registrar—Refusal to register based on inability to procure attendance of executants—Suit to compel registration

A sale deed was presented for registration but the executants did not appear before the Sub-Registrar who after four months from the date of execution reported the fact to the Registrar and was directed by the latter not to register it Registration was accordingly refused An appeal against that order

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* First Appeal No 38 of 1911 from a decree of Pratab Singh Subordinate Judge of Moradabad dated the 9th of September 1910

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to the Registrar was dismissed It appeared that the summonses by the Sub-Registrar to the executants had been returned unserved The vendees brought a suit for registration of the document *Held* that the suit was maintainable the refusal by the Sub Registrar to register not being based upon denial of execution *Luckhi Narain Khettry* v *Satcowrie Pyne* (1) distinguished

THE facts of this case were as follows —

The plaintiff presented a sale deed, dated the 2nd of June 1909, for registration before the Sub Registrar of Bijnor, on the 10th of July, 1909, and asked under section 36 of the Registration Act for the issue of summons to the executants, alleging that the defendants had by that deed transferred to him a certain share of a zamindari, that the defendants promised to get the deed registered within fifteen days from the date of execution, and that the defendants were not willing to get it registered Twice on his application summonses were issued, but were returned unserved and the Sub Registrar after the expiry of the usual four months from the date of execution reported the matter to the Registrar for his orders under Rule 182 of the Registration Manual The District Registrar by his order, dated the 9th of October, 1909 refused registration of the document, and the Sub Registrar in accordance with that order made an endorsement on the sale deed on the 12th of October, 1909, to the following effect Registration refused An appeal was preferred to the District Registrar against the order of the Sub Registrar of the 12th of October, 1909 The District Registrar dismissed the appeal on the 25th of November, 1909, on the ground that no appeal lay Thereupon the plaintiff instituted the present suit on the 22nd of December, 1909, under section 77 of the Registration Act, in the court of the Subordinate Judge of Moradabad, praying for a decree directing the sale deed to be registered. The suit was dismissed as against Musammat Mathuri and decreed *ex parte* against Bharat Singh the husband of the lady The plaintiff appealed.

Babu *Surendra Nath Sen*, for the appellant —

The lower court was clearly wrong in holding the suit not to be maintainable under section 77 of the Registration Act, because the order of the Sub-Registrar, dated the 12th October, 1909, was an order refusing registration, from which the appeal was preferred to the District Registrar, and the suit having been brought within thirty days from the dismissal of that appeal was clearly within time.

(1) (1883) I L R 10 Calc 189

Dr *Satish Chandra Banerji* for the respondent

Section 77 of the Registration Act provides for those cases in which registration is refused either under section 72 or 76 of the Act The order of the Registrar was clearly not under section 72 nor under section 76 (*a*) *Gangava* v *Sayava* (1) The order was one under section 25 made in the exercise of discretion and the Civil Court could not interfere with the exercise of that discretion It was in the discretion of the Registrar to allow or disallow registration of the document after the usual four months from the date of execution had expired The order of the Registrar refusing registration was the real order in the case and, as such, the appeal which was prepared was an appeal against the Registrar's own order and hence was not entertainable Even if the order be construed to be one falling under section 76 (*a*) the suit would be time-barred having been brought more than thirty days from the date of that order The order of the Sub Registrar (Registration refused '), dated the 12th of October, 1909 endorsed on the sale deed was not an order really *refusing registration*—for the Sub-Registrar had no discretion left after the Registrar's order —but was simply an order *not registering the document*

Reliance was placed on the following cases —

Veeramma v *Abbiah* (2), *Kudratia Begum* v *Najibunnessa* (3), *Udit Upadhia* v *Imam Bandi Bibi* (4)

Babu *Surendra Nath Sen*, replied

GRIFFIN and CHAMIER, JJ — This appeal arises out of a suit instituted by the plaintiff, Khadim Husain to have a document alleged to have been executed by the defendants on the 2nd of June 1909 registered Musammat Mathuri is the wife of the defendant No 1 She was joined as a defendant on the allegation that a portion of the property conveyed by the sale deed had been acquired *benami* in her name The plaintiff made two attempts to obtain attendance of the executants at the registration office On each occasion service of the summons was not effected on the executants By an order, dated the 12th of October, 1909 the Sub Registrar refused to register the document for reasons set out at length in his order of that date He stated that the plaintiff Khadim Husain, had been unable to effect service of summons on

(1) (1896) I L R 21 Bom., 699
(2) (1893) I L R 118 Mad 99
(3) (1897) I L R 25 Calc, 93
(4) (1902) I L R 24 All 402

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KHADIM HUSAIN v. BHARAT SINGH

the executants and that from the 17th of August, 1909, up to the date of the order, he had failed to take further steps On the expiry of the four months from the date of the execution, the Sub Registrar, under Rule 182 of the Registration Manual, sub mitted a report to the District Registrar, and in pursuance of the direction received from the Registrar on the 9th of October, 1909 he passed an order on the 12th of October, 1909, refusing to register the document The plaintiff filed an appeal against this order within time to the District Registrar That officer, by an order dated the 25th of November 1909 rejected the appeal The suit out of which this appeal has arisen, was instituted on the 22nd of December 1909 It was decreed *ex parte* against both the defendants on the 30th of June, 1910 On an application of the defendant No 2 the *ex parte* decree against her was set aside and the suit was retried so far as she was concerned The result of the retrial of the suit was that it was dismissed as against defendant No 2 The plaintiff comes in appeal against this order of dismissal The lower court was of opinion that the suit was not maintainable We find some difficulty in understanding the reasons given by the court below for holding that the suit was not maintainable On behalf of the respondent it is contended that the order of the court below was right on two grounds, the first is that no suit lay under section 77 of the Registration Act because the non attendance of the executants at the office of the Sub Registrar is equivalent to denial of execution and therefore the plaintiff's remedy lay in an application under section 73 of the Registration Act (XVI of 1908) and not in an appeal under section 72 Various rulings were placed before us They are all clearly distinguishable on the facts from the present case with one exception In all these cases the summons was served on the executant and the Sub Registrar refused registration on the ground of denial of execution

In *Luckhi Narain Khettry* v *Satcowrie Pyne* (1) which is the exception we have alluded to the judgement of the High Court shows that the Registrar had, on the facts before him, assumed or found that the alleged execution had been denied by the executant of the document, and he therefore refused to register it In the present case it is quite clear from the order of the

(1) (1883) I L R 10 Cal 189

Sub Registrar that the ground on which he refused registration was not denial of execution The grounds were those set out in his order It is next contended that the order of the District Registrar was not an order refusing registration The order of the 9th October 1909, is not before us We gather it was merely a direction to the Sub Registrar as to what he should do under the circumstances It could not have been a refusal to register the document because at that stage of the proceedings the document was not before the Registrar In our opinion an appeal did lie against the order of the Sub Registrar, dated the 12th of October 1909, refusing to register the document The order of the District Registrar dated the 25th of November, 1909, was in effect a dismissal of the appeal An appeal did lie to him and he refused to entertain it The plaintiff is, therefore, entitled to come into the Civil Court under the provisions of section 77 and claim to have his document registered We allow the appeal of the plaintiff set aside the order of dismissal and direct that the suit go back for retrial under order XLI, rule 23 of the Code of Civil Procedure Costs of this appeal will be costs in the cause

1912 — KHADIM HUSAIN v BHARAT SINGH

Appeal allowed—Cause remanded

REVISIONAL CRIMINAL

1912 *February* [illegible]

Before Mr Justice Karamat Husain and Mr Justice Tudball

EMPEROR v BABU LAL

Act No I of 1878 (Opium Act) sections 5 9—Master and servant—Liability of master for act of servant

Where the servant of a licensed vendor of opium in the course of his employment as such servant sold opium to a person under the age of fourteen years it was *held* that the licensed vendor also was liable under section 9 of the Opium Act even though he might not have been aware of the sale *Queen Empress v Tyab Ali* (1) followed

The facts of this case were briefly as follows —

One Babu Lal was a licensed vendor of opium One of the conditions of his licence was that sales should not be made to children under the age of fourteen years In the absence of Babu Lal his sales man sold opium to a person under fourteen Both the licensed vendor and the sales man were convicted under section 9 of the Opium Act, 1878 Babu Lal applied in revision to the

Criminal Reference No 706 of 1911

(1) (1900) I L R 24 Bom 423

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EMPEROR v BABU LAL

Sessions Judge, who, being doubtful whether his conviction was proper, referred the case to the High Court

The Assistant Government Advocate (Mr *R Malcomson*) for the Crown

The applicant was not represented

KARAMAT HUSAIN and TUDBALL, JJ —This is a reference by the learned Sessions Judge of Agra The facts of the case are briefly as follows —One Babu Lal was a licensed vendor of opium. One of the general conditions under which he was licensed to sell was that sales should not be made to children below the age of fourteen years In his absence his sales man sold opium to a person under the age of 14 Both the sales man and the licensed vendor have been convicted The learned Sessions Judge is of opinion that the licensed vendor, Babu Lal, is not liable under the circum stances of the present case for the act of his servant He has been convicted under section 9 of the Opium Act in that he has sold opium in contravention of the rules made and notified under section 5 Rules made and notified under this section set out the general condition which we have mentioned above The question is whe ther the master in the circumstances of the present case is liable for the act of his servant committed by the latter in the course of his employment but without the master s knowledge In Criminal Reference No 69 of 1890 a Judge of this Court held in similar circumstances in a case under the Excise Act of 1881 that the licensee was responsible for breaches of the conditions of his licence though not committed with his knowledge and permission In the case of *Queen Empress* v *Tyab Ali* (1) a similar class of offence was also under consideration. That was an offence under section 22 of the Indian Arms Act No XI of 1878 A licensed vendor of arms and ammunition had employed a manager to con duct his business In the absence of the licensed vendor and with out his knowledge the manager delivered certain military stores to a person without previously ascertaining that such person was legally authorized to possess the same It was held in that case that the master was liable The Court ruled as follows —' We fail to see how it can be contended that under these circumstances a delivery of goods by the man in charge would not be a delivery by the owner of the shop It is not a question of intention, of *mens rea* or of knowledge. It is the delivery which the Act makes penal,

(1) (1900) I L R., 24 Bom., 423.

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MANOHAR LAL v. RAM BABU

called to the case of *Har Prasad* v *Bhagwan Das* and other rulings of the various High Courts The learned Judges say at p. 45 —'It will be found upon examination of the facts of those cases that the first mortgagee had subsequent to the second mortgage purchased the equity of redemption of the mortgagor, and it was held that the second mortgagee was bound to redeem the earlier mortgage In that state of facts we should be disposed to say that the second mortgagee is not entitled to bring to sale the mortgagor's interest, because it no longer exists in the mortgagor, it has already passed into the hands of the first mortgagee

In the present case the prior incumbrancers have acquired the equity of redemption by virtue of the proceedings in 1878 just as effectually as they would have done if they had purchased it by private treaty See also *Baldeo Prasad* v *Uman Shankar* (1), *Mati ullah Khan* v *Banwari Lal* (2) and *Kanhai Lal* v *Hulas Singh* (3) The very question which arises in this case was decided in favour of the prior incumbrancer in the case of *Cangayam Venkataramana Iyer* v *Henry James Colley Gompertz* (4)

The respondent contends that he has an absolute right to bring the property to sale subject to the prior incumbrances and that the decree and sale to which he was no party cannot take away that right His learned advocate relies on the case of *Ramshankar Lal* v *Ganesh Prasad* We do not think that this case applies to the facts of the present case There the question was whether, having regard to the decision in *Mata Din Kasodhan* v *Kazim Husain*, a sub-mortgage (a mortgage of mortgagee rights) was valid It was held in the affirmative and the decision is no longer of much importance having regard to the order XXXIV, rule 1 of the Code of Civil Procedure, to which we have already referred It was not necessary to decide nor did the court decide, that in a suit brought by a puisne incumbrancer, to which a prior mortgagee who was also in possession of the property after acquiring the equity of redemption the court was bound to make a decree for sale of the mortgaged property subject to the prior mortgage and could not direct the puisne incumbrancer to redeem the earlier mortgage

(1) (1910) I L R 32 All., 10
(2) (1910) I L R 32 All 183
(3) (1911) 9 A L J 29
(4) (1908) I L R 31 Mad 425

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MANOHAR LAL v RAM BABU

The judgement in the case of *Debendra Narain Roy* v *Ram taran Banerjee* (1) no doubt supports the contention of respondent. With all respect we cannot agree with the learned Judges if in that case they intended to decide that in all cases, irrespective of whether the prior incumbrancer is or is not a party and irrespective of whether the prior incumbrancer has or has not obtained possession of the mortgaged property by acquiring the equity of redemption the court is bound to grant a decree at the suit of the puisne incumbrancer for the sale of the property subject to the prior incumbrance

A somewhat contrary view seems to have been taken by two learned Judges of the same court in *Har Pershad Lal* v *Dalmardan Singh* (2)

It is unnecessary to decide in the present appeal that in all suits by a puisne incumbrancer to which the prior incumbrancer is a party, the court is bound to direct redemption of the prior incumbrance, but we think that, as a general rule, if the prior incumbrancer is a party and so desires it will be convenient to direct redemption

Such a course will avoid multiplicity of suits and will give the puisne incumbrancer what he is equitably entitled to In a mortgage suit the court ought to have the fullest power to direct what is right and equitable having regard to the circumstances of the case and the interests of all the parties to the suit in the property In the present case the appellants have a strong claim to defend a possession extending over a period of nearly 20 years by insisting that the plaintiff should be directed to redeem them by payment of the amount due on foot of the mortgage of 1869

Before passing a final decree it will be necessary to refer issues to the lower appellate court. We accordingly refer the following issues —(1) At what date did the appellants or their predecessors in title obtain possession of the property? (2) What is the amount due on foot of the mortgage of the 6th of December, 1869, up to the date of obtaining such possession?

The court will take such additional evidence as the parties may tender On receipt of the findings the usual ten days will be allowed for filing objections.

Issues remitted

(1) (1903) I. L. R., 30 Calc., 599 (2) (1905) I. L. R., 32 Calc., 69

Before Mr Justice Sir Henry Griffin and Mr Justice Chamier

1912
February 13

JAMBU PRASAD (PLAINTIFF) v MUHAMMAD AFTAB ALI KHAN AND OTHERS (DEFENDANTS)

Act No III of 1877 (Indian Registration Act) sections 32 33—Registration—Evidence—Presumption of validity of registration—Presumption rebutted by evidence showing document to have been presented by an unauthorized person

Although when the validity of the registration of a document is in question after the lapse of a considerable period of time it is to be presumed that the registration was carried out according to law yet when there exists evidence which discloses a fatal defect in procedure as for instance that the person who presented the document for registration was not legally authorized to do so the registration must be held to be invalid Such a defect as presentation by an unauthorized person cannot be cured by subsequent admission of execution on the part of the executants *Mohammed Ewaz* v *Birj Lall* (1) and *Mujib un nissa* v *Abdur Rahim* (2) referred to *Wilaut Begam* v *Fazal Husain Khan* (3) and *Ram Chandra Das* v *Farzand Ali Khan* (4) distinguished

THE facts of this case were as follows —

The plaintiff sued on four deeds, of which two were executed in 1882 and the other two in 1892 The first two deeds were presented for registration by Nathu Mal, "mukhtar am" of Lala Mittar Sen, who was the mortgagee The registration endorsement was to the following effect —

"This document was presented in the office of the Sub Registrar of tahsil Saharanpur, on Tuesday the 11th July 1882 at 8 p m

Dated the 11th July 1882 (Sd) Nathu Mal, general attorney of Lala Mittar Sen

Signature of the Sub-Registrar

Nawab, &c (names and descriptions of the mortgagors) identified by names (&c) admitted the execution and completion of this document and received at this time in my presence the sum of Rs 59 000 in cash as per detail given in this document

Dated the 11th July 1882

Signature of the Sub-Registrar

Signatures of the mortgagors and of the witnesses

Registered as No &c &c Signature of Sub Registrar"

The two deeds of 1892 were presented for registration by Maula Bakhsh "karinda" of the mortgagors The registration endorsement ran as follows —

"Present —Munshi Anand Singh, Sub-Registrar

Maula Bakhsh Karinda presented this document in the office of the Sub-Registrar of tahsil Saharanpur to-day the 26th October 1892 at 1 p m

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*First Appeal No 3 of 1911 from a decree of Muhammad Shafi, Subordinate Judge of Saharanpur dated the 26th of September 1910

(1) (1877) L R 4 I A 166
(2) (1900) I L R 23 All 233
(3) (1910) 9 A L J 148
(4) (1912) I L R 34 All. 2.8

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MANOHAR LAL v. RAM BABU

The judgement in the case of *Debendra Narain Roy* v *Ram taran Banerjee* (1) no doubt supports the contention of respondent. With all respect we cannot agree with the learned Judges if in that case they intended to decide that in all cases, irrespective of whether the prior incumbrancer is or is not a party and irrespective of whether the prior incumbrancer has or has not obtained possession of the mortgaged property by acquiring the equity of redemption, the court is bound to grant a decree at the suit of the puisne incumbrancer for the sale of the property subject to the prior incumbrance

A somewhat contrary view seems to have been taken by two learned Judges of the same court in *Har Pershad Lal* v *Dal mardan Singh* (2)

It is unnecessary to decide in the present appeal that in all suits by a puisne incumbrancer to which the prior incumbrancer is a party, the court is bound to direct redemption of the prior incumbrance, but we think that, as a general rule, if the prior incumbrancer is a party and so desires, it will be convenient to direct redemption

Such a course will avoid multiplicity of suits and will give the puisne incumbrancer what he is equitably entitled to In a mortgage suit the court ought to have the fullest power to direct what is right and equitable having regard to the circumstances of the case and the interests of all the parties to the suit in the property In the present case the appellants have a strong claim to defend a possession extending over a period of nearly 20 years by insisting that the plaintiff should be directed to redeem them by payment of the amount due on foot of the mortgage of 1869

Before passing a final decree it will be necessary to refer issues to the lower appellate court We accordingly refer the following issues —(1) At what date did the appellants or their predecessors in title obtain possession of the property ? (2) What is the amount due on foot of the mortgage of the 6th of December, 1869, up to the date of obtaining such possession ?

The court will take such additional evidence as the parties may tender On receipt of the findings the usual ten days will be allowed for filing objections.

Issues remitted

(1) (1903) I L. R., 30 Calc., 599 (2) (1905) I L. R., 32 Calc., 89

Before Mr Justice Sir Henry Griffin and Mr Justice ...

JAMBU PRASAD (PLAINTIFF) *v* MUHAMMAD AFTAB ... AND OTHERS (DEFENDANTS)

Act No III of 1877 (Indian Registration Act) sections ...—Evidence—Presumption of validity of registration—Presumption ... evidence showing document to have been presented by an unauthorized ...

Although when the validity of the registration of a document ... after the lapse of a considerable period of time it is to be presumed ... registration was carried out according to law yet when there is ... which discloses a fatal defect in procedure as for instance that ... presented the document for registration was not legally authorized ... registration must be held to be invalid Such a defect as presentation by an unauthorized person cannot be cured by subsequent admission ... the part of the executants *Mohammed Ewaz* v *Birj Lall* (1) and *K...* v *Abdur Rahim* (2) referred to *Wilaiti Begam* v *Fazal Husain Khan* (3) ... *Ram Chandra Das* v *Farzand Ali Khan* (4) distinguished

THE facts of this case were as follows —

The plaintiff sued on four deeds of which two were ... in 1882 and the other two in 1892 The first two deeds were presented for registration by Nathu Mal, "mukhtar am" of ... Mittar Sen, who was the mortgagee The registration endorsement was to the following effect —

This document was presented in the office of the Sub Registrar of tahsil Saharanpur on Tuesday the 11th July 1882 at 3 p m.

Dated the 11th July 1882 (Sd) Nathu Mal general attorney of Lala M... Sen

Signature of the Sub-Registrar

Nawab &c (names and descriptions of the mortgagors) identified by names (&c) admitted the execution and completion of this document and received at this time in my presence the sum of Rs 59 000 in cash as per details given in this document

Dated the 11th July 1882

Signature of the Sub-Registrar

Signatures of the mortgagors and of the witnesses

Registered as No &c &c Signature of Sub Registrar"

The two deeds of 1892 were presented for registration by Maula Bakhsh "karinda' of the mortgagors The registration endorsement ran as follows —

Present —Munshi Anand Singh Sub-Registrar

Maula Bakhsh Karinda presented this document in the office of the Sub-Registrar of tahsil Saharanpur to-day the 26th October 1892 at 1 p m

First Appeal No 8 of 1911 from a decree of Muhammad Shafi Subordinate Judge of Saharanpur dated the 26th of September 1910

(1) (1877) L R 4 I A 166

(2) (1900) I L R 23 All 233

(3) (1910) 9 A L J 148

(4) (1912) I L R 34 All 2..

1912

JAMBU PRASAD v MUHAMMAD AFTAB ALI KHAN

Signature of the Sub-Registrar

(Sd) Maula Bakhsh Karinda

Nawab &c (name &c of the mortgagors) admitted the execution and completion of this document

Dated the 26th October 1892

Signature of the Sub Registrar

Signature of the mortgagors

Registered as No &c &c Signature of the Sub-Registrar'

No power of attorney authorizing either Nathu Mal or Maula Bakhsh or Ilahi Bakhsh to present documents for registration was produced in evidence The plaintiff produced evidence to prove that the mortgagors were present in the office of the Sub-Registrar when the deeds of 1882 were presented for registration and that they then asked Nathu Mal to present the deeds for them, which he accordingly did This evidence was disbelieved by the Subordinate Judge He held that the deeds were presented by unauthorized persons and the registration was invalid and dismissed the suit accordingly The plaintiff appealed

The Hon'ble Pandit *Sundar Lal* (with him The Hon ble Pandit *Moti Lal Nehru*), for the appellant —

There is no definition of the term "presentation" in the Registration Act, nor does the Act prescribe the exact mode in which a document is to be actually handed over to the registering officer If as the plaintiff's evidence shows, the executants presented themselves in person before the Sub Registrar, but instead of themselves placing the document in the hands of the Sub-Registrar, they asked Nathu Mal to hand it over for them and he then and there did so, the presentation would be valid For, it would in all respects be their own act although Nathu Mal performed for them the merely physical act of actually placing the document in the Sub-Registrar s hand The registration endorsement does not say that the documents were presented by Nathu Mal Similarly when a pleader presents a petition to the court, the presentation is deemed to be by the pleader none the less because of the fact that it is not he but the reader of the court who actually places the petition in the hands of the Judge We have to look to the substance of the thing There is no delegation of authority in such cases and so no power of attorney is required. I rely on *Wilaiti Begam* v *Fazal Husain Khan* (1) In that case the executant, who was a *parda*

(1) (1910) 9 A L J., 148

nashin lady, appeared before the Sub Registrar in a *duli* and the document was handed over to him by her father who had no power of attorney, and it was held that there was a valid presentation by *j* If it be held that the presentation was by Nathu Mal a ...t by the mortgagors themselves then I rely on the presumption which arises when a document is registered and the registration certificate is endorsed on it Every presumption will be made that everything was done as required by law I rely on the ruling in *Ram Chandra Das* v *Farzand Ali* (1) The result, in the present case, of that presumption is that it must be proved by positive evidence by the other side that the persons presenting the deeds had no authority whatsoever to do so It is not enough for the other side to produce a power of attorney and to show that it contained no authority to present documents for registration. They must exhaust all possibilities and establish that there was no power of attorney containing such authority Otherwise the presumption which *fully goes to this extent, holds good.*

Mr *B E O'Conor* (with him Mr *Abdul Raoof*, Mr *Nihal Chand* and Mr *S A Haidar*) for the respondents —

The persons by whom the documents were presented were unauthorized persons, the presentations were invalid, and the registration infructuous On this point the law is laid down in *Mujib un-nissa* v *Abdur Rahim* (2) Regarding the documents of 1882, the endorsement shows that they were presented by Nathu Mal and not by the executants, otherwise the signature of Nathu Mal would not have been taken below the entry about the presentation, vide section 52 clause *(a)* of the Registration Act The evidence adduced by the plaintiffs on the plea that Nathu Mal, at the request of the executants who were present, merely handed over the document for them is worthless and the ruling in *Wilaiti Begam* v *Fazal Husain Khan* does not, therefore, help them In that case the father merely handed over the document at the request and in the presence of the executant He did not act or purport to act as an agent In the present case the persons presenting the documents purported to act as agents, as the endorsements, signed by them as mukhtar ams, show So it was for them to prove that they were duly constituted agents The ruling in *Ram Chandra*

(1) (1912) I L R, 34 All, 253   (2) (1900) I L R 23 All 233.

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Das v *Farzand Ali*, which is in conflict with the spirit of the rulings in the cases already cited by me and in the case of *Ishri Prasad* v *Baijnath* (1) is distinguishable All that was laid down in that case was that where there was no evidence either way to prove or disprove the existence of a proper power of attorney it would be presumed that such a power did exist In the present case we have established by evidence that no proper power of attorney existed. The executants being residents of Saharanpur, such a power of attorney would be registered at Saharanpur We called the Sub Registrar of Saharanpur with his registers extending over a number of years Only one power of attorney in favour of Nathu Mal and one in favour of Ilahi Bakhsh, could be found in the registers Neither of these powers of attorney contained any provision for the presentation of documents for registration. We have disproved the existence of any proper power of attorney, and there is no room for any presumptions in favour of the plaintiffs As laid down in both of the cases cited by me, an invalid presentation is not a matter of mere technicality but one affecting the jurisdiction of the Sub Registrar A person presenting a document in the capacity of an agent is tied down to one or other of the three provisions contained in clauses *(a)*, *(b)* and *(c)* of section 33 which are imperative

The Hon ble Pandit *Sundar Lal*, in reply

The evidence produced by the respondents to disprove the existence of a valid power of attorney is not exhaustive

GRIFFIN and CHAMIER, JJ —This appeal arises out of a suit for sale on two mortgages, the first executed on the 2nd July, 1882, by Muhammad Ilias Khan, now deceased, the father of defendant 1 and the husband of defendant 2, and by one Syed Muhammad Khan, now deceased, who is represented by defendant 1 and the second executed on the 25th October 1892, by defendant 1 and Syed Muhammad Khan now represented by defendant 1 Defendant 3 has been joined as a puisne mortgagee The suit was defended on various grounds among others on the ground that the documents on which the suit was based had not been validly registered according to law The learned Subordinate Judge framed the following issue —Whether or not the documents in suit had been presented for registration by persons

(1) (1906) I. L. R 28 All. 707

authorized to do so, and whether or not they had been validly registered, and whether or not they affected the property sought to be sold, and whether the claim for money was time barred. The court below has found that the registration of both documents was invalid, and on this ground alone has dismissed the suit. The plaintiff appeals.

The material portions of the registration endorsements on the two documents are as follows:—

On the mortgage deed of the 2nd July, 1882.

Present:—Narain Singh Sub Registrar of Saharanpur.

This document was presented in the office of the Sub-Registrar of tahsil Saharanpur on Tuesday the 11th July 1882 at 3 p. m.

Dated the 11th July 1882.

(Sd.) Nathu Mal general attorney of Lala Mittar Sen.

Signature of the Sub Registrar.

Nawab Syed Muhammad Khan aged 50 years, and Muhammad Ilias Khan aged 35 years son of Muhammad Sardar Khan sect Afghan Bahraich occupation zamindars rais and residents of Kasba Saharanpur identified by Rao Muhammad Ali Khan Rajput 35 years, occupation zamindari rais and resident of mauza Sakranda tahsil Roorkee and Syed Tawangar Ali son of Syed Kabir Ali aged 50 years mukhtar of the court resident of Kasba Saharanpur, who are known to me personally admitted the execution and completion of this document and received at this time in my presence the sum of Rs. 59,000 in cash as per detail given in this document.

Dated the 11th July 1882.

Signature of Sub-Registrar.

(Sd.) Syed Muhammad Khan, in autograph.

(Sd.) Muhammad Ilias Khan in autograph.—Witnesses.

(Sd.) Muhammad Ali Khan.

(Sd.) Tawangar Ali Khan Mukhtar of the Court.

On the mortgage-deed of the 25th October, 1892:—

"*Present*:—Munshi Anand Singh Sub-Registrar Maula Bakhsh (karinda) (agent) presented this document in the office of the Sub Registrar of tahsil, *Saharanpur to-day* (*Wednesday*) the 26th October 1892 at 1 p. m.

Signature of the Sub Registrar.

(Sd.) Maula Bakhsh karinda in autograph.

Nawab Syed Muhammad Khan son of Sardar Khan aged 65 years and Aftab Ali Khan, son of Muhammad Ilias Khan aged 24 years by occupation zamindars, residents of Saharanpur sect Pathan *residents of mohalla* Nawabganj admitted the execution and completion of this document. I am satisfied as to (the identity of) these executants. The document be made over to Nathu Mal karinda" (agent).

Dated the 26th October, 1892.

Signature of the Sub-Registrar.

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(Sd.) Syed Muhammad Khan in autograph.

(Sd.) Muhammad Aftab Ali Khan in autograph.

Section 32 of the Registration Act No. III of 1877, the Act then in force, is as follows:—

32. Except in the cases mentioned in sections 31 and 89 every document to be registered under this Act whether such registration be compulsory or optional shall be presented at the proper registration office by some person executing or claiming under the same or in the case of a copy of a decree or order claiming under the decree or order or by the representative or assign of such person or by the agent of such person representative or assign duly authorized by power of attorney executed and authenticated in the manner hereinafter mentioned.

The material portions of section 33 are as follows:—

33. For the purposes of section 32 the powers of attorney next hereinafter mentioned shall alone be recognized, (that is to say)

(a) if the principal at the time of executing the power of attorney resides in any part of British India in which this Act is for the time being in force a power of attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides.

*

Any power of attorney mentioned in this section may be proved by the production of it without further proof when it purports on the face of it to have been executed before and authenticated by the person or court hereinbefore mentioned on that behalf.

In both the documents in suit Lala Mittar Sen (now represented by plaintiff) in whose favour they were executed is described as a resident of Saharanpur. It is not alleged that at the time of execution of these documents, Lala Mittar Sen resided elsewhere than at Saharanpur. The validity of the registration of the documents was impugned by the defendant No. 1 on the ground that they were presented for registration by persons not qualified under the Registration Act to make such presentation. The registration endorsements show that in the case of the mortgage-deed of 1882 it was presented by one Nathu Mal described as the general attorney of Lala Mittar Sen and in the case of the mortgage of 1892 that it was presented by one Maula Bakhsh, described as karinda (agent).

There is on the record no power of attorney in favour of either Nathu Mal or Maula Bakhsh such as is required by section 33 *(a)*.

In appeal it is contended on behalf of the appellants that every presumption should be made in favour of the validity of the registration proceedings and that it should be presumed that the Sub-Registrar had in each instance satisfied himself that the document

and the delivery by the manager is clearly in this case a delivery by the licensee The authorities are concurrent upon this point In *The Attorney General* v *Siddon* (1) the rule is thus stated — "Whatever a servant does in the course of his employment with which he is entrusted and as a part of it is the master's act" This rule which is of general application so far as civil liability goes is applicable to certain criminal proceedings also The court then noted the instances of *Mullins* v *Collins* (2) *Coppen* v *Moore* (3), the former of which was a case in which a sales man of a licensed victualler supplied liquor to a constable on duty and without the authority of his superior officer, and in which it was held that the licensed victualler himself was liable to be convicted In our opinion the offence in the present case is similar to the offences considered in the above mentioned cases It is not a question of intention *mens rea* or of knowledge The licensee holds his shop on certain conditions One of those conditions has been broken by his servant, and the mere act of selling opium in contravention of the conditions of his licence constitutes the offence It is one of those cases in which the act of a servant is the act of the master In our opinion the conviction of the master is legal We therefore direct that the record be returned.*

APPELLATE CIVIL

1912 February 7

Before Mr Justice Karamat Husain and Mr Justice Tudball

GOBARDHAN SAHAI (JUDGEMENT DEBTOR) v MAHABIR SINGH AND OTHERS (DECREE HOLDERS) †

Execution of decree—Decree passed in favour of several persons one of whom was a minor and not properly represented

Held that the mere fact that at the time when the final decree in a suit was passed one of the decree holders was a minor whose guardian *ad litem* had died and had not been replaced was not sufficient to invalidate the decree

THE facts of this case were as follows —

Mahabir Singh and others obtained a decree in the court of the Munsif of Deoria which was confirmed on appeal by the Subordinate

* [But see *In the matter of Dhoobun Chunder Shaw and another* 11 C L R 464 —ED]

† Second Appeal No 648 of 1911 from a decree of F D Simpson Additional Judge of Gorakhpur dated the 3rd of May 1911 confirming a decree of Lana Gopal Munsif of Deoria dated the 23rd of December 1910

(1) (1830) 1 Cr and J 220 (2) (1874) L R 9 Q B 292

(3) [1898] 2 Q B 306

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GOBARDHAN SAHAI v. MAHABIR SINGH

Judge The defendant appealed to the High Court, and pending this appeal, the guardian of one of the plaintiffs respondents, Sita Ram, who was a minor died and the appellant took no steps to have him properly represented The High Court dismissed the appeal In execution proceedings objection was raised by the judgement debtor, the present appellant, who was a *pro formâ* respondent in the original suit that the decree could not be executed as it was invalid The court of first instance dismissed the objection and this order was confirmed by the lower appellate court The judgment debtor appealed to the High Court

Babu *Surendra Nath Sen*, for the appellant

Mr *Muhammad Raoof* (for The Hon ble *Nawab Muhammad Abdul Majid*) for the respondents

KARAMAT HUSAIN and TUDBALL JJ —An application by the decree-holders was put in for the execution of their decree An objection was taken by the judgement-debtor that there was no valid decree which could be executed against him The facts as shown by the objection of the judgement-debtor are the following —The decree-holders obtained a decree from the lower appellate court against the present appellant and other judgement-debtors The latter preferred a second appeal to this Court While the appeal was pending the guardian *ad litem* of Sita Ram one of the respondents died No application was made by the judgement-debtor, appellant in that case to have another guardian *ad litem* appointed to represent the minor decree holder Sita Ram This Court dismissed the appeal of the judgement-debtor in that case and affirmed the decree of the lower appellate court The present appellant was one of the original judgement debtors and a *pro formâ* respondent in that appeal Under these circumstances the mere fact that one of the respondents in whose favour there was a valid decree was not represented at the instance of the appellant in that case is not, in our opinion sufficient to render the decree of this Court void and incapable of execution and as that decree is not a void decree, the executing court has no power to go behind it The result is that the appeal fails and is dismissed with costs

Appeal dismissed

Before Sir Henry Richards Knight Chief Justice and Mr Justice Banerji

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February 7

MANOHAR LAL AND ANOTHER (DEFENDANTS) v RAM B BU (PLAINTIFF)*

Mortgage—P i r and subsequent mortgages—Suit by first mortgagee without impleading second—Decree and sale—Subsequent suit by second mortgagee against purchaser under decree in first suit—Plaintiff held bound to redeem prior mortgagee

The plaintiff brought his suit for sale of certain property in satisfaction of a mortgage of the year 1877 which was a renewal of a mortgage of 18 5

The defendants were purchasers at a sale in execution of a decree on a mortgage which bore a later date in 1875 than the plaintiff's first mortgage but was a renewal of a previous mortgage of 1869 To the suit in which this decree had been passed the plaintiff had not been made a party The defendants had been in possession of the property so purchased by them for some twenty years

Held that the plaintiff had no absolute right to bring the property to sale in satisfaction of his mortgage subject to the mortgage of 1869 and that in the circumstances he ought to redeem that mortgage before bringing the property to sale *Mata Din Kasodhan* v *Kazim Husain* (1) *Ram Shankar Lal* v *Ganesh Prasad* (2) *Har Prasad* v *Brajnan Das* (3) *Kanti Ram* v *Kutubuddin Mahomed* (4) *Baldeo Prasad* v *Uman Shankar* (5) *Matiullah Khan* v *Banwari Lal* (6) *Kanhai Lal* v *Balai Singh* (7) *Can ayam Venkataramana Iyer* v *Henry James Colley Gompertz* (8) and *Har Pershad Lal* v *Dalmardan Singh* (9) referred to *Debendra Narain Roy* v *Ramtaran Banerjee* (10) discussed and doubted

THE facts of this case are fully stated in the judgement of the Court

Dr *Satish Chandra Banerji*, for the appellants

Secondary evidence of the mortgage of the 5th December 1869 should have been admitted. The mortgage is recited in the later deed of the 8th November, 1875, presumably it was returned to the mortgagor In any case the admission of the mortgagor is binding on the plaintiff who is a subsequent transferee from him, and the certified copy of the deed produced by us was wrongly rejected by the court below

The Hon'ble Pandit *Sundar Lal* (with him Mr *M L Agarwala*) for the respondent

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* First Appeal No 261 of 1910 from a decree of Banke Behari Lal Subordinate Judge of Aligarh dated the 23rd of January 1910

(1) (1891) I L R 13 All 4 2	(6) 1910) I L R 32 All 138
(2) (1 0?) I L R 29 All 5	(7) (1911) 9 A L J 29
(3) (188?) I L R., 4 All 196	(8) (19 8) I L R 31 Mad 4 5
(4) (1894) I L. R., 2? Calc 33	(9) (1905) I L R., 32 Calc., 891
(5) (1907) I L R., 8? All. 10	(10) (1903) I L R., 30 Calc., 599

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The defendants laid no foundation for the admission of secondary evidence, they adduced no evidence to prove that the original deed was either returned to the mortgagor or had been lost

The court ruled that the certified copy of the mortgage-deed was admissible in evidence

Dr *Satish Chandra Banerji*, for the appellants, next contended that the decree should be one for redemption of the prior mortgage in the first instance and then for sale and not one for sale subject to the prior mortgage The uniform practice in the Allahabad High Court had been to direct redemption of a prior mortgage when the same was set up as a shield, and thus wholly irrespective of the doctrine of *Matadin Kasodhan's case* (1), *Har Prasad* v *Bhagwan Das* (2) *Mamraj* v *Ramji Lal* (3), *Baldeo Prasad* v *Uman Shankar* (4) *Mati ullah Khan* v *Banwari Lal* (5) *Kanhai Lal* v *Hulas Singh* (6)

There was a distinction to be made between the position of a prior mortgagee and that of a purchaser in execution of a decree on the prior mortgage The rights of the mortgagor and the first mortgagee are now vested in the purchaser, the whole property in fact with the exception of the fragment of the equity of redemption transferred to the second mortgagee by the mortgagor This has not been yet foreclosed because the second mortgagee was no party to the suit on the first mortgage Had he been duly impleaded in that suit, all he could have claimed was a right to redeem the first mortgage His position did not improve because he was left out He can claim no higher equity now nor oust the purchaser from possession without paying him up, *Kanti Ram* v *Kutbuddin* (7) *Ram Narain* v *Bandi Pershad* (8), *Har Pershad Lal* v *Dalmardan Singh* (9) *Gangayam Venkataramana Iyer* v *Gompertz* (10) *Dhondo Balkrishna* v *Raoji Dadu* (11) *Debendra Narain Roy* v *Ramtaran Banerjee* (12) *Umesh Sirdar* v *Zahur Fatima* (13) *Muhammad Usan Rowthan* v *Abdulla* (14) *Chait Narain* v *Gunga Pershad* (15) Ghose on *Mortgage* ed 4 620—2

(1) (1891) I L R 13 All 432
(2) (1889) I L R 4 All 196
(3) (1900) 7 A L J R 15 16
(4) (1907) I L R 32 All 1
(5) (1909) I L R 32 All 136
(6) (1911) 9 A L J R, 29
(7) (1895) I L R 22 Calc 33 (45)
(8) (1904) I L R 31 Calc 737 (742)
(9) (1905) I L R 32 Calc 891
(10) (1903) I L R 31 Mad 495
(11) (1895) I L R, 20 Bom 290
(12) (1903) I L R, 30 Calc, 599
(13) (1890) I L R 18 Calc 164
(14) (1900) I L R 24 Mad, 171
(15) (1870) 25 W R, 216

The Hon'ble Pandit *Sundar Lal*, for the respondent

The law defines the rights respectively of the prior and puisne mortgagees The latter has the privilege to redeem, but it is not a legal duty Referred to section 74 Transfer of Property Act The puisne mortgagee has also the right to sell the property mortgaged to him It is not necessary that the prior mortgagee should be impleaded but if he is, then the subsequent mortgagee may sell subject to the first mortgage If the latter wants to sell free from mortgage then he must redeem The nature of his right will depend upon the form of his suit or his prayer According to section 67 of the Transfer of Property Act the ordinary right of a mortgagee is either to foreclose the property or to sell the property The term property means the *property mortgaged to the mortgagee* It follows therefore that a subsequent mortgagee can sell what is mortgaged to him that is the equity of redemption and leave the prior mortgage outstanding His position would not be worse if he is not made a party Where the puisne mortgagee is made a party to a prior mortgagee's suit, the object is to bind him by the decree which is passed. See 1 Daniell *Chancery Practice*, 6th ed, 217 Fisher, *Law of Mortgage*, ed. 6, para 1670

Where the subsequent incumbrancer has been omitted from the suit by a prior mortgagee, the decree does not bind him Hence he may sell or he may redeem In the first case he can sell such rights as he possesses, if he redeems he can sell the entire estate But there is no case except the case of *Mata Din Kasodhan* which would compel him to redeem He may choose to sell subject to the first mortgage The view of the Calcutta High Court favours this position, *Debendra Narain Roy* v *Ramtaran Banerjee* (1) *Ram Narain Sahoo* v *Bandi Pershad* (2) is distinguishable The right to redeem is the right which a subsequent mortgagee has as against a prior mortgagee who has obtained a decree behind his back, but that does not do away with the right which is available against the mortgagor, viz, the right to sell the property By compelling him to redeem only one side of the question is looked at and not the other, and a right is converted into a duty which is contrary to principle The latest case in Madras in which the view was

(1) (1903) I L R 30 Calc 599 (605)

(2) (1904) I L R 31 Calc 737

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adopted is *Malla Vitthl Seethi v Karambath* (1) Reference was also made to *Ram Shankar Lal v Ganesh Prasad* (2)

Dr *Satish Chandra Banerji*, was not heard in reply

RICHARDS C J, and BANERJI, J —This appeal arises out of a suit in which the plaintiff sought to realize the amount of a mortgage, dated the 4th of June, 1877, by sale of the mortgaged property The plaintiff alleged that the mortgage was in renewal of another mortgage of the 12th of June, 1875, and he claimed priority for his mortgage as of that date He further set forth in his plaint that the ancestor of the defendants first party had made a mortgage of the 8th of November, 1875 in favour of the ancestor of the defendants 9—11, that a suit had been instituted on foot of this mortgage of the 8th of November, 1875, and the property sold, but he submitted that this mortgage of the 8th of November, 1875, must under the circumstances, be deemed to be puisne to his mortgage, but that if any part of the defendant s mortgage should be held to have priority over his mortgage, then he asked that the property might be sold subject to the debt that had priority

The defendants 9—11 pleaded amongst other things, that the mortgage of the 8th of November, 1875, was a renewal of a still earlier mortgage bond of the 5th of December 1869 and that consequently they had priority and that the plaintiff could not have a sale of the mortgaged property without redeeming them.

It appears from the evidence that the defendants 9—11 brought a suit on foot of the mortgage of the 8th of November 1875, in the year 1887 A decree was obtained upon foot of that mortgage, the property was sold and purchased by the defendant, 3rd party, and they have been in possession ever since 1892 or thereabouts It appears however that the mortgagors of the mortgage of the 4th of June 1877 were not parties to the suit The present suit was instituted in the year 1909 The original amount secured was Rs 350 the interest being 13 annas per cent per mensem compound interest The amount due on this bond at the date of the institution of this suit was Rs 7 000 but the plaintiff only claimed Rs 6 000, because the property was not value for the full amount The learned Subordinate Judge gave the plaintiff a decree for so much of the mortgage debt and interest as was due under the

(1) (1911) M L J, 213

(2) (1907) I L R 29 All, 889 (?97 40?)

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mortgage of the 12th of June 1875 He disallowed the rest of the claim as being puisne to the plaintiff's mortgage of the 8th of November, 1875 and the plaintiff waived his claim thereto The learned Subordinate Judge also disallowed the defendants' pleas wherein they sought to take advantage of the earlier mortgage of the 5th of December 1869 on the ground that this bond of the 5th of December 1869 was not produced and that secondary evidence to prove it was not admissible

In our opinion secondary evidence was admissible, and we have allowed an application of the appellant to admit a copy Under ordinary circumstances the bond of the 5th of December, 1869, might have been given back It was fully recited in the later mortgage of the 8th of November, 1875

The position therefore necessary for the disposal of the appeal may be shortly stated as follows —The answering defendants are and have been in possession of the property since about year 1892 They must be deemed to have had a mortgage in their favour, which is prior to the mortgage of the plaintiff On the other hand the plaintiff has a puisne incumbrance and his rights under that incumbrance have never been foreclosed by the prior incumbrancers The answering defendants contend that having a prior incumbrance and being in possession of the mortgaged property their possession cannot be disturbed unless the plaintiff pays the amount due upon their prior incumbrance On the other hand the plaintiff contends that he has the right to realize his security and that he is accordingly entitled to have the property sold subject to the mortgage of the 5th of December, 1869, and that the decree in the suit brought on foot of the mortgage of the 8th of November, 1875, is an absolute nullity against him because he was not made a party thereto We think that the plaintiff ought to be ordered to redeem the mortgage of the 5th of December, 1869 The present suit is brought on foot of a mortgage of the 4th of June, 1877, which is, on the face of it, puisne to the mortgage of the 8th of November 1875, and the plaintiff has to ask us as a court of equity to allow him priority as of the 12th of June, 1875 He comes to this Court seeking equity Had the answering defendants made the plaintiff or his predecessor in title a party to the suit on foot of the mortgage of the 8th November, 1875, the sole right of the latter would have been to redeem

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the mortgage of the 5th of December, 1869 By allowing the plaintiff to redeem the mortgage of 1869 we are able now to place the plaintiff in exactly the same position as he would have been in if he had been made a party to that suit If, in the present case, we were to direct that the property should be sold subject to the mortgage of 1869, the result would probably be that the appellants, who have been in undisputed possession ever since about the year 1892, would be put out of possession, and it is doubtful if they could ever bring a fresh suit against the plaintiff having regard to the law of limitation. There is no doubt that where a puisne incumbrancer is in a position to ignore the prior incumbrancer and does not make him a party to his suit the puisne incumbrancer is entitled to realise his security, or, in other words to have the property sold subject to the prior incumbrance It was held in the case of *Mata Din Kasodhan* v *Kazim Husain* (1) that the expression 'property' in the Transfer of Property Act meant the actual property itself and did not include rights and interests in such property and that accordingly a puisne incumbrancer could never bring the property to sale without redeeming all prior incumbrances This view was dissented from in the Full Bench case of *Ram Shankar Lal* v *Ganesh Prasad* (2) and the question has been finally settled by order XXXIV, rule 1, of the Code of Civil Procedure, which expressly provides that a prior incumbrancer is not a necessary party to the suit It is true that in the present case the plaintiff only claims to sell subject to the prior incumbrance but he has made the prior mortgagees parties He had to do so because they were in possession In England it would seem to be the rule that where the prior mortgagee is made a party, the plaintiff (that is the mortgagor or the puisne incumbrancer) must be ready to redeem him See Daniell's Chancery Practice, 7th ed p 217

This would seem to have been the practice in this Court even before the case of *Mata Din Kasodhan* v *Kazim Husain* was decided. See also *Har Prasad* v *Bhagwan Das* (3) In the case of *Kanti Ram* v *Kutubuddin Mahomed* (4) a Bench of the Calcutta High Court held that the puisne incumbrancer was entitled to have the property sold subject to the prior incumbrance even where the prior incumbrancer was a party The attention of the Court was

(1) (1891) I L R 13 All 432
(2) (1907) I L R, 29 All.
(3) (1892) I L R 4 All., 196
(4) (1895) I L R 22 Calc 33

was presented for registration by a person duly authorized under the law Reliance is placed on the observations of their Lordships of the Privy Council in *Mohammed Ewaz v Birj Lall* (1) —

Jambu Prasad v Muhammad Aftab Ali Khan

Undoubtedly it would be a most inconvenient rule if it were to be laid down generally that all courts upon the production of a deed which has the Registrar s endorsement of the registration should be called on to inquire before receiving it in evidence whether the Registrar had properly performed his duty Their Lordships think that this rule ought not to be thus broadly laid down

if the registration could at any time at whatever distance of time be opened parties would never know what to rely on or when they would be safe

We have been further referred to two unreported decisions of this Court in F A. No 244 of 1910, decided on the 10th January, 1912, (2) and in F A No 389 of 1909 (3) The facts of neither case bear any resemblance to those of the case before us In F A No 244 of 1910 the court said —

In our opinion the production of the bond with the certificate of due registration endorsed thereon raised a strong presumption in favour of the due registration of the bond and that in the absence of clear proof that the requirements of law were not complied with the court was bound to admit the document in evidence Section 114 of the Evidence Act coupled with section 60 of the Registration Act seems to us to be abundant justification for this proposition

Conceding the existence of the presumption contended for by the learned advocate for the appellant, we have to consider the evidence by which the respondent sought to rebut that presumption They called the Sub Registrar of Saharanpur to produce the register of powers of attorneys for the Saharanpur division from 1878 to 1886 The Sub-Registrar appeared as a witness His evidence printed at page 1 of the respondent s book shows that he produced in Court Register No IV of 1882 That register contained a general power of attorney registered on the 19th of July, 1882 (13 days before the execution of the mortgage deed of 1882) executed by Lala Mittar Sen in favour of Nathu Mal The power of attorney did not authorize Nathu Mal to register documents on behalf of Lala Mittar Sen nor was it authenticated in the manner prescribed by section 33 of the Registration Act

The evidence of this witness was recorded on the 30th August 1910 The suit was not decided until the 26th September, 1910 The plaintiff therefore had ample time in which to have a thorough

(1) (1877) L R 4 I A 166 (2) Since reported I L R., 34 All., 253 (257)
(3) Since reported 9 A L J 148

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search made in the records of the registration office. No other power of attorney except that deposed to by the Sub-Registrar has come to light. It is contended on behalf of the appellant that the respondents have not exhausted every possibility, but we must hold nevertheless that the respondents have established by evidence the existence of a very strong probability that Nathu Mal held no such power of attorney as would authorize him to present documents for registration and that in respect of the deed of 1882, the respondents have succeeded in rebutting the presumption in favour of the validity of registration proceedings.

With regard to the deed of the 25th October, 1892, the matter stands on a different footing. The registration endorsement shows that the document was presented for registration by one Maula Bakhsh described as a *karinda* (agent). In paper No. 213 a petition filed in the court below on behalf of the respondent No. 1, it was stated that Maula Bakhsh was not a general attorney. He appears to have been employed as a *karinda* (agent) by the executants of the bond. No power of attorney in his favour is on the record nor is there any evidence that any such power of attorney exists. There is no proof of any search having been made for powers of attorney between 1886 and 1892. In the case of the mortgage deed of the 25th October, 1892, therefore, we must give effect to the presumption in favour of the validity of the registration proceedings.

It was further contended on behalf of the appellants that the substance of the proceedings before the Sub-Registrar should be looked to, and that it was immaterial by whose hands the document reached that of the Sub-Registrar provided there were persons present before that official who were qualified under the law to have the document of 1882 registered. It is pointed out that the registration endorsement on that document shows that the executants were present before the Sub-Registrar and admitted the execution of the document. We were also referred to the evidence of one Gobind Rai, a witness called by the plaintiff. He was an attesting witness to the document. He says that he was present at the registration and that the executants asked Nathu Mal to present the documents before the Sub-Registrar. The learned Subordinate Judge did not believe his evidence. He was produced

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on the 21st September 1910, (by which time the plaintiff had realized that Nathu Mal was not duly authorized to present the document for registration) no doubt with the object of showing that Nathu Mal had handed the document to the Sub Registrar at the request of the executants We think it impossible for him to remember such a trifling incident after a lapse of 28 years, and we do not accept his evidence As to the other branch of the argument for the appellant that the executants who were present at the registration office should be regarded as the persons presenting the document for registration there is the initial obstacle in the way of the appellant that the registration endorsement shows that it was presented by Nathu Mal It has not been proved in this case that the executants were actually present when the document was presented for registration Their presence in the office of the Sub Registrar at that particular moment of time cannot be inferred from the registration endorsement The only inference that can be drawn from that endorsement is that the executants attended the Sub Registrar s office on the same day as the document was presented The argument on behalf of the appellant is in effect that it does not really matter by whom the document was presented for registration provided the executants appeared before the Sub-Registrar and admitted execution The provisions of sections 32 and 33 of the Registration Act No III of 1877, are not open to this lax interpretation. In *Mujib un nissa* v *Abdur Rahim* (1) their Lordships of the Privy Council observed —

When the terms of section 32 are considered with due regard to the nature of registration of deeds it is clear that the power and jurisdiction of the Registrar only come into play when he is invoked by some person having a direct relation to the deed '

In this case we have found that the mortgage deed of 1882 was presented by Nathu Mal, a person who had no authority to present the document for registration. In view of the observations of their Lordships of the Privy Council, set out above, we are unable to hold that this initial defect, if it can be said to be merely a defect, can be held to be cured by the subsequent admission of execution by the executants Nor can we hold that the provisions of section 87 of the Act can be invoked in aid of the validation of registration proceedings done in violation of the express provisions of sections 32 and 33 of the Registration Act

(1) [1900] I L R 23 All 233

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We, therefore, dismiss the appeal in so far as the suit on the mortgage-deed of the 2nd July, 1882, is concerned We allow the appeal in so far as the suit on the mortgage deed of the 25th October, 1892, is concerned The respondents will receive their proportionate costs in both courts in so far as they have been successful The costs of the appeal in so far as the suit on the second mortgage is concerned will be costs in the cause We remand the case for decision on the merits in respect of the mortgage deed of the 25th October, 1892

Decree reversed —Cause remanded

APPELLATE CRIMINAL

1912
February 14

Before Mr Justice Sir George Knox

EMPEROR v JASAULI *

Act No XLV of 1860 (Indian Penal Code) section 366—Kidnapping—Taking out of custody

Where two girls under the age of 16 years ran away from their houses and remained for one or two days in the house of a woman who belonged to the caste of *Naiks* in Kumaun and no report was made to the padhan or the patwari *held* that the woman in whose house the girls stayed was properly convicted of an offence under section 366 of the Penal Code *Queen* v *Gunder Singh* (1) dissented from

Two girls, inhabitants of Kumaun, both of them under the age of sixteen years, ran away from their homes and were discovered some distance away in the house of one Musammat Jasauli, a Naik, where they had been for one or two days Jasauli had made no report of their arrival to the padhan or the patwari On these facts Jasauli was prosecuted and convicted under section 366 of Indian Penal Code Against her conviction and sentence Jasauli applied in revision to the High Court

Mr *M L Agarwala*, for the accused

The Assistant Government Advocate (Mr *R Malcomson*), for the Crown.

KNOX, J —Musammat Jasauli has been convicted of an offence under section 366, Indian Penal Code, and sentenced to five years rigorous imprisonment She has sent in a petition of appeal from jail and has been represented in this Court by learned counsel

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* Criminal Appeal No. 878 of 1911 from an order of D Calnan Sessions Judge of Kumaun dated the 20th of November 1911

(1) (1865) 5 W R Cr R., 6

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EMPEROR v JASAULI.

It is contended on her behalf that nothing more is established against her beyond this—that the two girls Dhanauli and Gidhauli both of them under sixteen years of age, were wandering about and found their way to the village where Musammat Jasauli lives—Both girls admit that they had run away from their houses—and that they remained nearly one or two days in Musammat Jasauli's house, and that these facts are not enough to bring the Musammat within the four corners of section 366 and do not justify the sentence passed, at the outside the offence is merely a technical offence I have considered all these points, also the evidence on the record and I consider that the view taken by the learned Sessions Judge is justified by the evidence on the record. I have been referred to the case of *Queen v Gunder Singh* (1) With every respect to the learned Judges who decided that case, I find myself unable to agree with the view they took, there is the further element in this case that Musammat Jasauli belongs to the well known caste of Naiks in Kumaun. I cannot think that she took these two girls out of charity She made no report to the padhan or the patwari dismiss the appeal

Appeal dismissed

APPELLATE CIVIL

1912
February 15

Before Sir Henry Richards Knight Chief Justice and Mr Justice Banerji

BELA RANI AND ANOTHER (PLAINTIFFS) v MAHABIR SINGH AND OTHERS (DEFENDANTS)

Act No 1 of 1872 (*Indian Evidence Act*) *sections* 11 *and* 32—*Evidence—Admissibility—Statements of deceased persons*

Held that if the terms of a deposition made by a person since deceased do not fall within the provisions of section 32 of the Indian Evidence Act 1872 the provisions of section 11 of the Act will not avail to make such deposition evidence

THIS was a suit for possession of immovable property One Beni Ram who died in 1866, owned the property in dispute He was succeeded by his wife, Musammat Mathuri, who died in 1878, and was succeeded by her daughter, Musammat Dasodri. After her death the plaintiffs the transferees of the rights of the reversioners, brought this suit for possession of the property as against the defendants who were the transferees (or their

First Appeal No 338 of 1910 from a decree of Achal Behari Subordinate Judge of Banda, dated the 17th of June 1910

(1) (1865) 5 W R Cr R., 6

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BELA RANI v MAHABIR SINGH

(representatives) of Musammat Dasodri The main defence was that the Musammat died more than 12 years prior to the institution of the suit which was accordingly barred by limitation The Subordinate Judge dismissed the suit as barred by limitation The plaintiffs appealed

The Hon ble Dr *Sundar Lal*, for the appellants

Munshi *Damodar Das* for the respondents

RICHARDS, C J —This appeal arises out of a suit for possession of immovable property The property originally belonged to one Beni Ram who died in the year 1866 He was succeeded by his wife Musammat Mathuri, who died in the year 1878 After her death Musammat Dasodri daughter of Beni Ram was in possession The plaintiffs are more or less speculative purchasers from the persons who would be entitled to the property on the death of Musammat Dasodri assuming that she had made no valid transfer The defendants are transferees or the representatives of Musammat Dasodri The main defence was that the suit was barred by limitation, and the learned Subordinate Judge found that the suit was barred

It is common ground that the right to bring the present suit arose on the death of Musammat Dasodri It is also admitted that neither the plaintiffs nor their predecessors in title have ever been in possession of the property in dispute There can be no doubt therefore, that it lay upon the plaintiffs to establish their case and to show that Musammat Dasodri died within the twelve years before the institution of the suit I also think that it is very just and equitable that the plaintiffs should be held to strict proof A very long time has elapsed since the transfers were made The reversioners did not attempt themselves to challenge the transfer and it is not easy for the transferees to bring forward proof of legal necessity The suit was instituted on the 4th of March 1910 In the plaint it was alleged that Musammat Dasodri died on the 28th of March, 1898 In appeal here the date of her death is alleged to be the 16th of March, 1898 It will, therefore, appear that on the plaintiff's own case the suit was not instituted until the period of limitation had almost expired

The learned Subordinate Judge considered that the oral evidence adduced by the plaintiffs was almost worthless and in this I quite agree It is, however, contended on behalf of the appellants that

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BELA RANI v. MAHABIR SINGH

there was certain documentary evidence to which great weight should be attached. It appears that on the death of Musammat Dasodri applications were made for mutation of names in respect of some of the property in the possession of which she had been. These applications were supported by depositions of the reversioners, two of whom were sons of the Musammat and the date of her death was stated to be the 16th of March, 1898. There is no doubt that, if these depositions are admissible in evidence, they supported the case of the plaintiffs. They are not necessarily conclusive, but having regard to the date at which they were made and the persons who made them they would be important. The persons who made the depositions are dead and the depositions accordingly are simply the statements of relevant facts by persons who are dead. Such statements are not relevant facts unless they come under some one or more of the sub-sections of section 32 of the Evidence Act. It has to be admitted that under the circumstances of the present case the depositions in question are not admissible under section 32. The learned advocate for the appellants ingeniously argues that while the depositions cannot be admitted under the provisions of section 32 nevertheless the fact that these persons made the statement that Musammat Dasodri died on the 16th of March, 1898 makes it highly probable that she did die on that particular date and that therefore the depositions are admissible under section 11 of the Evidence Act. In my opinion this argument is not sound. I think it impossible to hold that a statement of a relevant fact which would be inadmissible under section 32 could be admissible under section 11. If these depositions are excluded there is practically no evidence as to the actual date of the death of Musammat Dasodri, and I think, that the learned Subordinate Judge was correct in holding that the plaintiffs had failed to prove their case. I would accordingly dismiss the appeal with costs.

BANERJI, J.—I am of the same opinion. The question is whether Musammat Dasodri died at some time subsequent to the 4th of March, 1898. If it cannot be established that she died subsequently to that date, the claim is clearly time barred. The oral evidence adduced to prove the date of her death is unreliable though not for the reasons given by the learned Subordinate Judge, which are

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clearly erroneous Unless, therefore, the statements made in the mutation case referred to in the judgement of the learned Chief Justice, can be admitted in evidence, the allegation of the plaintiff as to the date of Musammat Dasodri's death must be held not to have been proved

I agree with the learned Chief Justice that the statements relied on cannot be admitted in evidence They are the statements of persons who are dead Statements of such persons can only be admitted under sections 32 and 33 of the Evidence Act It is conceded that the statements in question do not come within the purview of those sections and are, therefore, not admissible under those sections, but it is contended that they are admissible under section 11 as being facts which make the existence or non existence of a fact in issue highly probable The making of such a statement is, no doubt, a fact which would make the fact in issue highly probable and as such, might be admissible in evidence, but it must be proved before it can be admitted The terms of section 11 are, it is true, wide, but they must be read subject to the other sections of the Act, and therefore the fact relied on must be proved in accordance with the provisions of the Act If that fact is a statement made by a person who is not called or cannot be called, the statement cannot be admitted unless it comes within the purview of subsequent sections of the Act for example, sections 32 and 33 That such was the intention of the Legislature is manifest from the elaborate provisions of the Act as to relevancy of evidence Surely it cannot be said that the statement of a person who said to another person that he had seen a murder committed can be admitted unless the person who made the statement is called.

As I have pointed out above, a statement made by a person who is not produced as a witness is only admissible in the exceptional cases provided for by the Evidence Act and in no other cases The statements which the plaintiffs ask us to admit are clearly not statements which come within the exceptional provisions of the Act; they are therefore, not admissible and we must hold that the plaintiffs have failed to prove that their claim is within time I agree in dismissing the appeal

BY THE COURT —The appeal is dismissed with costs

Appeal dismissed

REVISIONAL CRIMINAL

1912
February 19

Before Mr Justice Tudball

EMPEROR v BHAGOSA PATHAK AND OTHERS *

Criminal Procedure Code section 133 – Public nuisance – Construction of dam causing injury to villages lands

A B and C being contiguous villages of which C lay at a lower level than A and B the surplus water falling on A and B used to run off through certain natural channels over the lands of village C The inhabitants of C erected a dam to keep the water from their lands and by so doing caused flooding of and damage to the lands of A and B *Held* that the area and number of persons affected by the action of the inhabitants of C were sufficient to justify a magistrate in treating the action as a public nuisance and taking steps to abate it under section 133 of the Code of Criminal Procedure

In this case three villages were concerned Aman and Basarat on the one side and Barkagaon on the other The villages were contiguous and the last mentioned lay at a lower level than Aman and Basarat and in consequence the surplus water from these two villages escaped through certain natural channels over the lands of Barkagaon To some extent this water was retained by means of a dam, which had been the subject of former litigation The men of Barkagaon extended this dam and thereby caused the lands of the other two villages to be flooded The inhabitants of Aman and Basarat thereupon petitioned the magistrate to take action under section 133 of the Code of Criminal Procedure, and he did so and ordered the removal of the new portions of the dam Against this order the inhabitants of Barkagaon applied in revision to the High Court

Babu *Surendra Nath Sen* for the appellants

Dr *Tej Bahadur Sapru* for the opposite party

TUDBALL J —This application for revision arises out of proceedings taken by a Magistrate under section 133 of the Criminal Procedure Code The facts as far as they can be gathered from the record and the not very luminous judgement of the Magistrate appear to be as follows —The complainants are residents and cultivators of Aman and Basarat, the opposite party are residents of Barkagaon The lands of the latter village lie at a lower level than those of the two former and when excessive rain falls the ...

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* Criminal Revision No 740 of 1911 from an order of ... Magistrate first class of Gorakhpur dated the 24th of November ...

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EMPEROR v BHAROSA PATHAK

lands flows down upon the lower lands of Barkagaon Presumably both sets of lands lie in an ill-defined hollow In 1885, there was civil litigation between the parties in regard to a dam which the Barkagaon people built across their fields to prevent the excess water from the lands above flowing on to their lands The Civil Court held that the dam was an ancient one and maintained it The patwari's evidence also shows that there is a *tal* or *jhil* in Aman, the end of which is also damned to keep back its waters and that this dam is broken in several places

The complaint made to the Magistrate was to the effect that the opposite party, the Barkagaon men, had extended their old dam both eastwards and westwards, thereby adding a further obstruction to the flow of excess water along its natural channel over the lands of Barkagaon with the result that the lands above the dam were flooded and a large area of crops damaged As usual, they exaggerated their case by pleading that houses in their villages had been flooded out and had fallen.

The Magistrate, who inspected the locality and recorded the evidence has found that there has been a considerable extension of the dam resulting in the holding up of a large volume of water, and that this has resulted in considerable injury to the crops growing over a considerable area above the dam

He has, therefore passed an order for the removal of the extensions He has ostensibly taken action under Chapter X of the Criminal Procedure Code which relates to public nuisances

The pleas raised and pressed in this Court are —

(1) That the Magistrate had no jurisdiction in the matter as it was merely a case of disputed civil rights

(2) That the applicants were justified in their action as it was taken to protect their own lands and crops

In regard to jurisdiction the matter is by no means clear Section 133 enables the Magistrate to take action under it *if he considers* on information and inquiry (if any) that an unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public or from any public place

There can be no doubt that the applicants have placed (by extending their dam) an unlawful obstruction in the channel along

which the complainant party has in the past drained off the surplus waters which flow upon their lands. This extension has been found by the Magistrate to have been recently made It affects the lands of at least two villages A person is guilty of a public nuisance who does any act which causes common injury to the public or the people in general who dwell or occupy property in the vicinity (*vide* section 268 Indian Penal Code) The resultant injury in the present case affects a large area of cultivated land and a considerable body of persons It is difficult, if not impossible, to lay down any fixed boundary between what constitutes a public nuisance and what a private nuisance, but in the present case, seeing that the cultivators of two villages are affected there can be little doubt that the case is one of a public nuisance There cannot be any doubt that even from before 1885, that portion of the public affected by the act has been draining off the excess waters which come upon its lands over the lands of the applicants, and that the applicants have placed an unlawful obstruction to prevent the flow of water along its natural channel, a channel which the public body affected has a right to use for the removal of excess water over and above that held up by the smaller pre-existing dam. The case, no doubt is close to the border line between private and public nuisances, but in the circumstances I do not see sufficient cause for interference on revision on this point The second plea has no force A common nuisance cannot be excused on the ground that it causes some convenience or advantage to the applicants (section 268, Indian Penal Code)

The case is one in which I do not think interference is necessary or advisable, and I therefore dismiss the application.

Application dismissed

1912
February, 20

REVISIONAL CIVIL

Before Mr Justice Sir George Knox

HEYDORN AND COMPANY (PLAINTIFFS) *v* MUHAMMAD SHAFI AND ANOTHER (DEFENDANTS) *

Act No IX of 1887, (Provincial Small Cause Courts Act) section 25—Jurisdiction of High Court—Revision—Refusal of leave to amend plaint

Held that the refusal on the part of a Court of Small Causes of permission to amend a technical defect in the plaint amounted to an irregularity such as would justify the interference of the High Court in revision under section 25 of the Provincial Small Cause Courts Act 1887

THE plaintiffs, a firm carrying on business in Germany, sued the defendants for recovery of a sum of money as the price of goods sold The plaint and the vakalatnamah in favour of the pleader appearing for the plaintiff were signed by one Mumtaz Ahmad holding a power of attorney bearing a German stamp At the hearing it was contended for the defendant that the power of attorney was invalid as not bearing on it a British Indian stamp The case was postponed on several occasions and at the final hearing Mumtaz Ahmad asked for leave to amend the verification of the plaint by inserting "Mumtaz Ahmad agent of Heydorn & Co" The Judge of the Court of Small Causes held that as Heydorn & Co did not carry on business either in their own names or in that of Mumtaz Ahmad, the amendment applied for by the latter did not improve matters He thereupon dismissed the suit The plaintiff company applied in revision to the High Court

Dr *Satish Chandra Banerji*, for the applicants contended that the Judge had overlooked the provisions of order VI, rule 14 of the Code of Civil Procedure, order III, rule 1, had no application 'Duly authorized' meant duly authorized under the *lex loci* Under section 35 of the Stamp Act the power of attorney could have been stamped on payment of a penalty The suit should not have been dismissed He referred to *Basdeo v John Smidt* (1)

Babu *Balram Chandra Mukerji* (for Maulvi *Ghulam Mujtaba*) for the opposite party, contended that no revision lay The court below had jurisdiction to dismiss the suit Section 25 of the Small Cause Courts Act no doubt gave the High Court

* Civil Revision No. 125 of 1910

(1) (1900) I L R., 22 All. 55

wider jurisdiction than that conferred on it under section 125 of the Code of Civil Procedure, but the High Court should not interfere in a case like this where at most there was an error of law. It was the plaintiff's duty to pray for an adjournment and get the power of attorney properly stamped. No such effort was made. The Court had no option but to dismiss the suit. The course adopted by the plaintiff showed fully that he never took his stand on the grounds now urged. Order VI, rule 17, presupposes a valid plaint. Order III, and previous orders must be complied with before order VI rule 17, could be applicable. Revisional powers being discretionary should not be exercised in this case.

KNOX, J.—A suit was instituted in the Court of Small Causes at Cawnpore on the 24th of May 1911. The plaint was signed and verified by one Mumtaz Ahmad. Mumtaz Ahmad purported to be acting and to be authorized to act for Messrs. Heydorn & Co. When the power under which he professed to act was scrutinized, it was found that it did not bear the stamp required by Act No. II of 1899. The result was that the power could not be admitted in evidence for any purpose. Apparently the defect in the power was not realized by the court until some time after the plaint had been brought upon the register. But when the case came on for hearing a preliminary objection was taken on behalf of the defence to the effect that the suit was not entertainable, as the plaint was not properly signed and verified, and there was no proper presentation of the plaint. The Court of Small Causes arrived at the conclusion that Mumtaz Ahmad had no *locus standi* and the pleader appointed by Mumtaz Ahmad had *no locus standi* before the court and the suit was accordingly dismissed. It does not appear that the attention of the court was directed to a case of this Court, *Basdeo* v. *John Smidt* (1). That case was, it is true, decided upon the Code of Civil Procedure as it stood in the year 1899. But in regard to this matter the only difference that I can find between the Code as it stood in 1899 and the Code of 1908 is that the present Code is in favour of all mere technical defects in pleadings being amended in such a manner that the court can determine the real questions in controversy between the parties. The real questions in controversy are set out in the four issues

(1) (1900) I. L. R., 22 All., 55.

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HEYDORN AND COMPANY v. MUHAMMAD SHAFI

framed by the court below Those questions have not been determined. The court has acted upon a technical plea It is no doubt of the utmost importance that a defendant should not be required to plead until his adversary has shown that he has put in such a case before the court as the defendant is required to answer, and if the Court of Small Causes allowed the plaintiff to amend the pleadings in such a way as to place this point beyond dispute, and the plaintiff had failed within the time allowed to make the necessary amendments, it would have very properly dismissed the suit The court might have put the plaintiff to terms such as seemed necessary to indemnify the defendant for having brought him to court for answering a premature suit The Court of Small Causes not having done so has acted with such irregularity as calls for an interference I accordingly set aside the order of dismissal and I order that the suit be returned to the Court of Small Causes, Cawnpore, with directions, to take it up at the stage at which it was before the order of the 12th of August, 1911, was passed, and under the provisions of order VI, rule 17, to allow the plaintiff to amend the pleadings and then to determine the real questions in controversy between the parties or if the necessary amendments have not been made within the time allowed, to dismiss the suit Costs will abide the event

Application allowed

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APPELLATE CIVIL

1910
February 20

Before Sir Henry Richards Knight Chief Justice and Mr Justice Banerji
RISALI AND ANOTHER (PLAINTIFFS) v BALAK RAM AND OTHERS (DEFENDANTS)

Pleadings—Suit for cancellation of father s will brought by daughters—Plea of custom excluding daughters from inheritance—Custom not allowed to be raised in this suit

On suit by the daughters of the testator for a declaration that a will alleged to have been executed by their father was a false and fraudulent document and not binding on them the defendants set up a custom by virtue of which the daughters but not apparently daughters sons were excluded from inheritance to their father s property

Held that as members of their father s family the daughters who but for the will on the death of their mother would take the property of their father had a cause of action which entitled them to bring the suit and the issue whether or not a custom existed excluding them from inheritance was not a fit and proper issue to be determined in the present suit

The facts of this case were as follows —

This appeal arose out of a suit in which the plaintiffs sought a declaration that a will said to have been executed by one Ramji Lal shortly before his death was not a genuine document, but was a false and fraudulent will The plaintiffs in the suit were Musammat Shibbo the widow of Ramji Lal and Musammats Baldai and Risali, his minor daughters under the guardianship of their mother The defendants were fifteen persons who would take the property under the will of Ramji Lal, if genuine It is admitted that possession is still with the widow, Musammat Shibbo The defendants pleaded that the will was genuine and also that there was a custom prevailing amongst *Jats* to which class Ramji Lal belonged which prevented the daughters inheriting any right in their father s property They also pleaded, as to Musammat Shibbo that she had no interest in the suit because her rights as widow were not interfered with by the alleged will

The Subordinate Judge dismissed the suit As against the widow he dismissed it on the ground that she was entitled to the property under the will, and therefore she had no cause of action He further decided that the will was a forgery but that the daughters had no right to maintain the suit because he found that a custom prevailed amongst the community which prevented daughters inheriting The plaintiffs appealed

First Appeal No 229 of 1910 from a decree of Muhammad Husain Additional Subordinate Judge of Meerut dated the 19th of April 1910

1912

RI ALI
v
BALAK RAM

Babu *Balram Chandra Mukerji*, for the appellants

The Hon'ble Pandit *Moti Lal Nehru* and Pandit *Mohan Lal Nehru* for the respondents

RICHARDS, C J, and BANERJI, J —This appeal arises out of a suit in which the plaintiffs sought a declaration that a will said to have been executed by one Ramji Lal shortly before his death was not a genuine document but was a false and fraudulent will The plaintiffs in the suit were Musammat Shibbo, the widow of Ramji Lal and Musammats Baldai and Risali minors, under the guardianship of their mother The defendants were fifteen persons who would take the property under the will of Ramji Lal, if genuine It is admitted that possession is still with the widow, Musammat Shibbo The defendants pleaded that the will was genuine and also that there was a custom prevailing amongst *Jats*, to which class Ramji Lal belonged which prevented the daughters inheriting any right in their father s property They also pleaded as to Musammat Shibbo that she had no interest in the suit because her rights as widow were not interfered with by the alleged will

The learned Subordinate Judge dismissed the suit As against the widow he dismissed it on the ground that she was entitled to the property under the will, and therefore she had no cause of action He further decided that the will was a forgery, but that the daughters had no right to maintain the suit, because he found that a custom prevailed amongst the community which prevented daughters inheriting

Musammat Shibbo has not appealed but the daughters have appealed, and it is contended on their behalf that the learned Subordinate Judge ought not to have gone into the question of the existence or non existence of the alleged custom All that they asked in their plaint was to have the question of the validity of the will decided, and that if that question was decided in their favour, the court ought to have made a decree in the terms of the prayer in the plaint

In our opinion the contention of the appellants is sound. It is quite clear that the widow had an interest in bringing the suit The estate that she would take under the will would be quite a different estate from what she would take under the ordinary Hindu law The latter would entitle her to alienate the property for pious purposes and for legal necessity As, however, she has not appealed, we are not concerned with her

[The judgement after discussing the evidence thus proceeded —]

It is strongly contended on behalf of the defendants that notwithstanding this finding the decree of the court below ought to be upheld because the learned Subordinate Judge has found that a custom exists which excludes the daughters from inheriting their father's property. In our opinion this issue ought not to have been gone into at all. *Primâ facie* and until the defendants succeed in showing that a custom exists which excludes them they are entitled upon the death of their mother to succeed to the property, unless, of course, a valid will stands in their way. They are, in our opinion, entitled to get rid, by a declaration of the court, of a false and fraudulent document interfering with the rights which they would have under the ordinary law. Furthermore the custom as alleged in the defence was merely a custom which excluded them from inheritance. The custom, as stated in the defence, did not disentitle the sons of daughters. We have already mentioned that the fifteen persons referred to in the will are not the persons who would take even if the alleged custom were proved. Therefore it might fairly be said that the daughters, as members of their father's family, had an interest in getting rid of a false and fraudulent will under which persons not entitled under the ordinary or customary law would take the family property. They claim that on the death of the widow their mother, they would be entitled to the property, and therefore this alleged will casts a cloud upon their title which they are interested in having removed. In our opinion the appellants, the daughters of Ramji Lal, had a cause of action which entitled them to bring the suit, and the issue as to whether or not a custom existed excluding them from inheritance was not a fit and proper issue to be tried and determined in the present suit. We express no opinion as to the existence or non existence of the alleged custom, or on the question whether or not, assuming some custom to exist it excludes not only daughters but daughters' sons. These are questions which may have to be tried at some future time.

We allow the appeal, set aside the decree of the court below and decree the plaintiffs' claim with costs in both courts. The objections filed on behalf of the respondents must be disallowed, and we dismiss them.

Appeal allowed.

1912
February 21

REVISIONAL CRIMINAL

Before Mr Justice Sir George Knox

RAM SINGH v MATHURA AND OTHERS *

Criminal Procedure Code section 250—Frivolous or vexatious complaint—Award of compensation to accused—Award to be made by order of discharge or acquittal and not by separate order

Held that section 250 of the Code of Criminal Procedure was not intended to meet the case of false accusations but of frivolous and vexatious accusations

Held also that the direction to pay compensation in a case found to be frivolous or vexatious cannot be made in a subsequent proceeding but must form part of the order of discharge or acquittal

This was a reference made under section 438 of the Code of Criminal Procedure by the Sessions Judge of Banda The facts are thus stated in the order of reference —

"This is an application for revision of an order purporting to have been passed under section 250 Code of Criminal Procedure by Mr Gwynne Joint Magistrate of Mahoba sub division by which Ram Singh applicant was ordered to pay Rs 90 to Mathura and others as compensation

It appears that Ram Singh brought a complaint against Mathura and others charging them with offences under sections 343 and 454 Indian Penal Code The case was tried by Mr Gwynne who recorded an order of acquittal on the 21st September 1911 At the end of this order he recorded — The complainant must show cause why he should not be mulcted in Rs 50 under section 250 Code of Criminal Procedure

He then recorded separate proceedings under section 250 Code of Criminal Procedure and fixed the 16th October for hearing evidence On the 16th October he took the evidence of eight witnesses and on the 30th October 1911, recorded an order by which he ordered Ram Singh to pay Rs 90 compensation to Mathura and others or in the default to undergo 20 days simple imprisonment

It is urged in support of this application that the order as to compensation should have been made along with the order of acquittal passed on the 21st September 1911 The Joint Magistrate had no jurisdiction to make it subsequently

Further it is urged that the order as to imprisonment could not be made until it was found that the compensation could not be recovered I am of opinion that both contentions are right and that the Joint Magistrate had no jurisdiction to order payment of compensation on the 30th October 1911 In *In the matter of the complaint of Safdar Husain* (1) it was held by the Hon ble High Court that compensation must be awarded by the order of discharge or acquittal and that an order for payment of compensation made in a separate proceeding after the accused had been discharged was not merely irregular but without jurisdiction The present case is on all fours with *Safdar Husain's* case

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* Criminal Reference No. 77 of 1912

(1) (1903) I L R 25 All 325

"I therefore, order the record to be submitted to the Hon'ble High Court under section 438 Code of Criminal Procedure with the recommendation that the order of the Joint Magistrate as to payment of compensation be set aside, and that the amount if paid be ordered to be refunded The Joint Magistrate will be called upon to furnish the necessary explanation if any

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RAM SINGH v MATHURA

KNOX J —This case has been rightly reported I find that the learned Magistrate in his judgement says —' The case is utterly false and I acquit all the accused Section 250 of the Code of Criminal Procedure was not intended to meet the case of false accusations It was meant to meet with frivolous and vexatious accusations Where a person complains that he was kept in confinement for three days he is going a long step beyond making a frivolous or vexatious accusation Over and above this, the words contained in section 250 are clear If a Magistrate wishes to direct payment of compensation in frivolous cases, he is to give the direction by his order of discharge or acquittal In other words before pronouncing the order of discharge or acquittal, he has to call upon complainant and to record and consider any objections that the complainant may make After having done so, and not before should he place on record or, at any rate only then, pronounce his order of discharge or acquittal I set aside the order of payment of Rs 30 as compensation and direct that it be returned to Ram Singh

APPELLATE CIVIL

1912
February 22

Before Sir Henry Richards Knight Chief Justice and Mr Justice Banerji

NATH MAL AND ANOTHER (PLAINTIFFS) v ABDUL WAHID KHAN AND OTHERS (DEFENDANTS) *

Act No III of 1877 (Indian Registration Act) section 32—Registration—Presentation

Where the executants of a document which it is desired to register are present acquiescing in the handing over of the document to the Registrar for registration the fact that the physical act of handing the document to the Registrar is performed by a person who is not authorized to present the document for registration will not render the presentation invalid

The facts of this case were as follows —

The plaintiffs brought a suit on the basis of a registered mortgage bond, dated the 27th of January, 1887 In the court of the Subordinate Judge of Saharanpur a preliminary objection was

* First Appeal No 23 of 1911 from a decree of Muhammad Shafi Subordinate Judge of Saharanpur dated the 28th of September 1910

1912
February 24

FULL BENCH

Before Sir Henry Richards Knight, Chief Justice, Mr Justice Banerji and Mr Justice Tudball

SHEOAMBAR AHIR AND OTHERS (PLAINTIFFS) v THE COLLECTOR OF AZAMGARH AND OTHERS (DEFENDANTS) AND MAHABIR AHIR AND ANOTHER (PRO FORMA PLAINTIFFS) *

Jurisdiction—Civil and Revenue Courts—Act (Local) No II of 1901 (Agra Tenancy Act) sections 4 95 167 197—Act (Local) No III of 1901 (United Provinces Land Revenue Act) sections 5 233 (i)—Suit for declaration regarding various alleged customary rights of zamindars, mostly of the nature of cesses.

A suit was filed by certain tenants of a village against the zamindars praying for a declaration that no custom existed in their village which entitled the zamindars to take certain fruits and wood, or to the use of a plough, or to a number of other dues, including sugarcane juice from some of the tenants, poppy seed from the Koeries and various other matters of the same description.

Held that the suit was properly filed in a Civil Court, and was not excluded from the jurisdiction of such court by anything contained in either the Agra Tenancy Act, 1901 or the United Provinces Land Revenue Act, 1901.

The facts of this case were as follows —

At the seventh settlement of the district of Azamgarh an entry was made in the wajib-ul-arz of mauza Jamalpur to the effect that the zamindars were by usage entitled to certain dues by way of cess from the tenants, namely half the fruit and wood of trees including clumps of bamboo five seers of poppy seed from each Koeri tenant, one pot of sugarcane juice from each tenant one rupee from each tenant pressing sugarcane in a mill &c. The tenants of mauza Jamalpur brought a suit in the court of the Subordinate Judge on the allegations that the said entry was made behind their backs at the instance of the zamindars, that at the sixth settlement the zamindars attempted to obtain a similar entry but it was decided that there was no such custom in their favour, that there never had been nor was any custom or usage by which the zamindars were entitled to the said dues. The relief sought was a declaration as to the non-existence of any such custom or usage One of the pleas in defence was that the suit was not cognizable by the civil courts but by the revenue courts Both the

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* Second Appeal No. 619 of 1911 from a decree of Ram Autar Pande District Judge of Azamgarh, dated the 6th of April 1911 confirming a decree of Ram Chandra Chaudhri, Subordinate Judge of Azamgarh dated the 19th of August, 1910.

lower courts gave effect to this plea and dismissed the suit. The plaintiffs appealed to the High Court.

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SHEOAMBAR AHIR v. THE COLLECTOR OF AZAMGARH.

Babu *Surendra Nath Sen*, for the appellants:—

The suit is cognizable by the civil court. The relief sought is a declaration that an alleged custom does not exist. It is the civil court alone which can go into the question whether a certain custom exists or not; the revenue courts have no jurisdiction to entertain such a suit. The disputed entry in the wajib-ul-arz expressly bases itself upon a usage, and not upon an agreement between the landlord and tenant. If these dues were claimed as a matter of contract between the landlord and tenant, the case would be different. Whether the dues are of the nature of rent or cess or other dues, the suit having regard to the relief claimed, is of a nature cognizable by the civil court alone.

Section 167 of the Tenancy Act bars the cognizance by civil courts of certain suits specified in the Act. The only provision of the Act which might be regarded as applicable to this suit is section 95, clause (*d*). But the suit does not come under section 95 (*d*), for it is not a suit for a declaration as to the rent payable *in respect of a holding*. That section applies to all matters in dispute relating to the contract or agreement between landlord and tenant in respect of a holding; it has no application where the dues claimed are neither based on agreement nor are in respect of the holding. The disputed dues are quite independent of the nature or extent of the holdings; they are something over and above the rents. For example five seers of poppy seed are claimed from a tenant, not because of his holding but because he is a Koeri; one rupee is to be paid not because a tenant grows sugarcane, but because he presses it in a mill. Some of the plaintiffs have only groves, which are not "holdings," having regard to the definitions of "holding" and "land" in the Tenancy Act.

Again, section 95 (*d*) cannot apply unless the dues are "*rent*." The defendants claim them to be and they are entered in the wajib-ul-arz as "cesses" within the meaning of section 56 of the Land Revenue Act. The wording of that section shows that a clear distinction is drawn between (1) rent and cess, and (2) between rent and dues "which are of the nature of rent payable in addition to the rent of tenants." Neither cesses nor such dues are "rent,"

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SHEOAMBAR AHIR v THE COLLECTOR OF AZAMGARH

therefore within the meaning of the Land Revenue Act Now, the meaning of the word 'rent' in that Act is defined to be the same as that under the Tenancy Act The dues therefore are not rent within the meaning of the Tenancy Act, and so section 95 (d) does not apply

Mr *A E Ryves* (with him Dr *Satish Chandra Banerji* and Maulvi *Muhammad Ishaq*), for the respondents —

It is not the civil court alone which can determine a question as to the existence or otherwise of a custom A revenue court is quite competent to entertain and decide such a question if it arises in connection with the amount of rent payable *vide* section 37 of the Tenancy Act If the zamindars sued one of these tenants for rent, saying that so much was rent proper and besides so much on account of dues based on custom, the rent court could enter into the question of the existence of the custom in order to determine the correct amount of the rent Having regard to the relief claimed therefore it cannot be said that the suit is not cognizable by the revenue court

On the other hand it is exclusively cognizable by the revenue court, for it comes under section 95 (d) The dues are not independent of the holdings but in respect of them They are payable by the tenants *as such* that is to say in respect of their holdings The test is not whether the dues are proportional in amount to the extent of the holdings, but whether they are payable by the tenants only or by other persons as well, who are not agricultural tenants

Then these dues come under the term "rent" in section 95 (d) The definition of 'rent' in the Tenancy Act is wide enough to cover these dues It includes whatever is payable for the occupation of land The ruling in *Mahabir* v *Sheodihal* (1) is in my favour

There is no real distinction between 'rent' and things in the nature of rent drawn by section 56 of the Land Revenue Act, under which section most of these dues were professedly entered. No sharp line of demarcation can be drawn The Act is badly framed Besides section 95 (d) of the Tenancy Act, section 233 clause (i) of the Land Revenue Act, also bars the jurisdiction of the

(1) Weekly Notes 1885 p 320

civil court The definition of rent is the same for both the Acts, but there is this difference that section 233 (i) does not speak of the rent *payable in respect of a holding* The ruling in S A No 497 of 1910 decided on 8th June 1913 supports my case

Babu *Surendra Nath Sen* was not heard in reply

RICHARDS C J —This and the connected appeal arise out of suits in which the plaintiffs sought a declaration that no custom existed in their village which entitled zamindars to take certain fruits and wood or a right to the use of a plough and a number of other alleged dues including sugarcane juice from some of the tenants poppy seed from the Koeries and various other matters of the same description The suit was instituted in the court of the Subordinate Judge of Azamgarh He decided that the suit was not cognizable in a civil court and he declined to return the plaint for presentation in the proper court The learned District Judge in first appeal affirmed the decision of the Subordinate Judge and dismissed the plaintiffs suit The plaintiffs come here in second appeal

I think that the question whether or not the villagers are liable to these dues is a question of very great importance, no matter what is the proper tribunal to decide it However, all that we have to decide in the present appeal is whether or not the suit is cognizable by a civil court

In my opinion the suit was cognizable in the civil court *Prima facie* the civil court is the court to decide all cases of a civil nature Only cases which by express enactment are withdrawn from the cognizance of the civil court are not triable by that court It is argued that section 95 read with section 167 excludes the present suit from the cognizance of the civil court Section 167 provides that the suits specified in the fourth schedule shall only be cognizable in the revenue court included in the fourth schedule are the suits specified in section 95 Section 95 provides that at any time during the continuance of the tenancy either the landholder or the tenant may sue for a declaration as to any matters there mentioned Amongst these matters is the rent payable in respect of a holding and whether it is payable in cash or in kind It is argued that this suit is a suit as to the rent payable for the holding and whether it is payable in cash or kind Reliance is also placed upon section 233 clause (i) of the Land

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Revenue Act, which provides that no suit shall be instituted in the civil court by a tenant in respect of the rent payable by him.

It seems to me that rent in both section 95, clause (*d*), of the Tenancy Act, and section 233, clause (*i*) of the Land Revenue Act, refers to the ordinary conventional or contractual rent payable by a tenant for his holding. No doubt the definition of rent in section 4 of the Tenancy Act is wide. It is there defined as being whatever in cash or kind is to be paid or delivered by a tenant for land held by him or on account of groves, tanks, *et cetera*. Notwithstanding this definition it seems to me that the plaintiffs in the present case can not, in truth, be said to be suing in respect of a matter relating to the rent payable in respect of their holding. The claim of the zamindars which the plaintiffs seek to resist in the present case is, it seems to me, a claim based on custom, the zamindars claiming by right of custom to be entitled to certain cesses or dues. These dues to some extent are claimed, no doubt, by reason of the fact that the plaintiffs are tenants and to this limited extent it may be argued that they are payable in respect of their holdings. It is extremely difficult to see how fulfilment of some of these customary rights could be enforced in the revenue court. One custom is the giving to the zamindars the use of a plough. If the tenant refused it seems to me that the zamindar's only right would be to sue for damages, and such a suit could only be brought in the civil court. Again it would be impossible for the zamindar to enforce the delivery of the sugarcane juice if by chance the tenant did not grow any sugarcane, and accordingly the value of the sugar cane juice would have to be assessed and sued for as damages. I may mention that the wajib-ul-arz which is the basis of the claim of the zamindars, particularly specifies some of the items as being cesses referred to in section 56 of the Land Revenue Act. That section is as follows:—

In the North-Western Provinces all cesses which are payable by tenants on account of the occupation of land and which are of the nature of rent payable in addition to the rent of tenants or in lieu of which proprietary rights may be assigned under section 78, clause (*b*) shall be recorded by the record officer under the appellations by which they are known and no cesses not so recorded shall be recoverable in any civil or revenue court.

In the Land Revenue Act it is expressly provided that the term *rent* is to have the same meaning as it has in the Tenancy Act. It

is quite clear that this section draws a distinction between rent and payments in the nature of rent. These latter payments are not "rent." In the words of the section itself they are payments which have to be made in addition to the rent. It seems to me that there is no provision in either the Land Revenue Act or the Tenancy Act which excludes from the cognizance of the civil court a suit for a declaration that no custom exists in the village which renders the plaintiffs liable to the payment of these dues.

The plaintiffs also sue to have the entry as to these alleged dues declared null and void as against them, on the ground that they were entered in the wajib-ul-arz behind their back and without their having a proper opportunity of showing that no such custom existed. If these allegations are correct, it seems to me not at all unreasonable that the plaintiffs should have a declaration to the effect that the entries are not binding on them.

I would allow the appeal and remand the suit for trial on the merits.

BANERJI, J.—I also am of opinion that the suit brought by the plaintiffs was not excluded from the cognizance of the civil court. Section 167 of the Agra Tenancy Act provides that no court other than the revenue court shall take cognizance of any dispute or matter in respect of which any suit or application of the nature specified in the fourth schedule to the Act might be brought or made. Therefore unless the suit is of the nature mentioned in the schedule its cognizance by the civil court is not forbidden by the section. The plaintiffs' claim may be taken to be a claim for a declaration that they are not liable to pay the amounts or deliver the articles mentioned in the wajib-ul-arz of the village which the defendants (zamindars) claim from them. Unless these payments can be brought within the meaning of the word "rent" as used in section 95, clause (*d*) of the Act the suit would be cognizable by the civil court. Clause (*d*) of section 95 provides that a landholder or a tenant may sue for a declaration as to the rent payable in respect of the holding of a tenant. The word "rent" is defined in section 4, clause (iii) as meaning "whatever is in cash or in kind to be paid or delivered by a tenant for land held by him." The remainder of the definition is inapplicable to the present case. Now "land" as defined in the Act means "land which is let or

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SHEOMBAR AHIR v THE COLLECTOR OF AZAMGARH

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The plaintiffs also sue to have the entry as to these alleged dues declared null and void as against them on the ground that they were entered in the wajib-ul arz behind their back and without their having a proper opportunity of showing that no such custom existed. If these allegations are correct, it seems to me not at all unreasonable that the plaintiffs should have a declaration to the effect that the entries are not binding on them.

I would allow the appeal and remand the suit for trial on the merits.

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held for agricultural purposes" The amounts which the defendants claim as payable by the plaintiffs and the articles which they say the plaintiffs must deliver to them are not payable or deliverable in respect of land which is held for agricultural purposes Therefore the matter to which the suit relates cannot be deemed to be rent within the meaning of the Agra Tenancy Act In my opinion the rent mentioned in clause (*d*) of section 95 is rent payable in respect of an agricultural holding and cannot apply to what is payable in *addition* to rent, such as is referred to in section 56 of the Land Revenue Act Therefore there is nothing in the Agra Tenancy Act which makes a suit like the present cognizable by a revenue court As rent has the same meaning in the Land Revenue Act as it bears in the Agra Tenancy Act section 233, clause (*i*), of the Land Revenue Act does not apply to a case of this kind. The suit not being cognizable by a revenue court, the only court which can take cognizance of it is the civil court, and the courts below ought to have tried it on the merits I agree in the order proposed.

TUDBALL, J—I also agree in the order proposed To my mind it is quite clear that the present suit cannot be said to be one for a declaration as to the rent payable by the plaintiffs in respect of their holdings It is unnecessary to go into details Many of the items are such that they could clearly be only recovered in a civil court, for example the claim of Re 1, which it is said a tenant of the village pays to the zamindar when he sets up a sugarcane press in the village to press his own cane This cannot by any possible stretch of the meaning of ordinary language be said to be part and parcel of the rent It is a claim entirely independent of the holding and in no way concerned with it It is an item to recover which the zamindar would have to sue in the civil court and in the civil court alone Section 56 of the Land Revenue Act also to my mind is quite clear, the claims made by the zamindars thereunder are claims made over and above the rent that is payable in respect of the holding In this view I have not the slightest hesitation in holding that the present suit was cognizable by the civil court

BY THE COURT—The order of the court is that the appeal is allowed the decrees of the courts below are set aside and the case

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is remanded to the court of first instance through the lower appellate court with direction to readmit it under its original number in the register and proceed to hear and determine the same according to law The appellants will have their costs in this court and in the court below Other costs will abide the result

Appeal allowed Cause remanded

APPELLATE CIVIL

1912
February 26

Before Mr Justice Karamat Husain and Mr Justice Tudball

BHAGWAN DAS (DEFENDANT) v. BAJ NATH (PLAINTIFF)

Civil Procedure Code (1882) sections 278 279 280 281—Execution of decree—Attachment—Objection to attachment—Objection dismissed—Suit to recover possession—Jurisdiction

Held on a construction of sections 278 279 280 and 281 of the Code of Civil Procedure 1882 that an objector may raise an objection to an attachment not only on the ground that he is in possession of the property attached but also on the ground that he has an interest in it and that when an executing court disallows the claim of an objector under section 281 the court has jurisdiction to do so notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection on some other ground

The facts of this case were as follows —

One Kishori Lal was the owner of the property in dispute and other property On the 5th of August, 1888, he made a simple mortgage of all the properties to Nizam-ud-din After that, he, on the 22nd of December 1888 mortgaged them to Kirpa Dayal and others, who obtained a decree on their mortgage on the 3rd of July, 1889 The prior mortgagee was no party to this suit The prior mortgagee, Nizam-ud-din, on the 20th of August, 1889, got a decree on his mortgage without impleading the subsequent mortgagee The latter purchased the property, on the 20th of June, 1891, in execution of his decree and afterwards obtained actual possession. By the consent of the two mortgagees, the sale proceeds were first applied to the satisfaction of the decree on the prior mortgage, but a balance remained unsatisfied Then on the 13th of September 1898, Kirpa Dayal sold the property to one Bhagwan Das, and afterwards Durga Prasad got a portion of the property by pre-emption Nizam-ud-din then purchased

Second Appeal No 504 of 1911 from a decree of H W Lyle, District Judge of Agra, dated the 24th of February 1911 modifying a decree of Shiva Prasad, Subordinate Judge of Agra dated the 11th of July 1910

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BHAGWAN DAS v. RAJ NATH

the property in execution of his decree and obtained formal possession on the 21st of February, 1900 In 1904 the plaintiff, Raj Nath, attached this property actual possession of which was with Bhagwan Das and Durga Prasad in execution of a simple money decree against Nizam ud din Objections under section 278 of the Civil Procedure Code of 1882 were filed and were disallowed on the 4th of July, 1904 The plaintiff got the property sold and purchased it himself and obtained formal possession on the 9th of October, 1904

The present suit for actual possession was brought on the 9th of October, 1909

Mr *G W Dillon*, for the appellant, submitted that the order of the 4th of July 1904 was not such an order as could be final under section 281 of the Code of Civil Procedure 1882 It was not an order under that section It was merely a summary order which did not decide anything on the point of possession It was not a case of erroneous decision, and the plaintiff's suit could not succeed on the ground that that order was not contested. He cited *Badri Prasad* v *Muhammad Yusuf* (1) and *Jugobandhoo Bose* v *Sachyat Bibee* (2) The latter case is exactly in point and it was followed and distinguished in *Gooroo Doss Roy* v *Sona Monee Dossia* (3) and *Sreemunto Hajrah* v *Syud Fajooddeen* (4) It was still good law The present suit was filed 19 years after and during the whole of that time the appellant was in possession. The appellant's possession is *quâ* mortgagee and hence he could not be liable for mesne profits The sale having been made with the consent of the prior mortgagee and the sale proceeds having been applied in satisfaction of his decree he did not get anything in the subsequent sale He referred to *Monmohiney Dassee* v *Radha Kristo Dass* (5)

Dr *Tej Bahadur Sapru*, for the respondent, submitted that the objections on which the order of the 4th of July was passed, had been filed under section 278 and a third party need only say that the property was not liable to attachment The grounds mentioned in section 279 had been made more specific than in section 278 A

(1) (1877) I L R 1 All. 381
(2) (1871) 8 B L R., App 39; 16 W R C R., 22
(3) (1873) 20 W R C R, 345
(4) (1874) 21 W R., C R 409
(5) (1902) I L R 29 Calc, 543

court might be competent to go into the question of possession, but the Legislature never intended that it should go into that question. Having regard to section 279, 280 it did not follow that a court was bound to go into that question. He cited *Sridhari Lal* v. *Ambika Prashad* (1) and *Mallikarjun* v. *Narhari* (2). The court which passed the order had jurisdiction and even if that order was bad it was final until set aside. The order might not be correct but it was an order purporting to be under section 279. The aggrieved party was entitled to bring a suit to set it aside within a year. It was entirely immaterial if the order was erroneous. The conclusiveness of an order did not depend upon its correctness but upon the question whether the court which passed it had jurisdiction.

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BHAGWAN DAS v. RAM NATH.

Mr. *G. W. Dillon* was heard in reply.

KARAMAT HUSAIN and TUDBALL, JJ.—One Kishori Lal was the owner of the property in dispute and other property. On the 5th of August, 1888, he made a simple mortgage of all those properties in favour of Nizam-ud-din. Subsequently on the 22nd of December 1888, he mortgaged them to Kirpa Dayal and others, who obtained a decree on their mortgage on the 3rd of July, 1889, without impleading the prior mortgagee Nizam-ud-din. The latter, on the 20th of August, 1882, obtained a decree upon his mortgage without impleading Kirpa Dayal and others. Kirpa Dayal and others executed their decree against the mortgaged property and purchased it on the 20th of June, 1891. They obtained actual possession afterwards. When they applied for the sale of the mortgaged property, Nizam-ud-din put in an application to the effect that he had no objection to the sale of the property, provided the sale proceeds were first applied to the satisfaction of his own decree. The court granted that application, and the whole sale proceeds were applied to the satisfaction of the decree in favour of Nizam-ud-din. A balance however remained unsatisfied. Kirpa Dayal, after obtaining actual possession of the property, sold it privately on the 13th of September, 1898 to Bhagwan Das. Durga Prasad succeeded in pre-empting a portion of the property sold by Kirpa Dayal to Bhagwan Das. Nizam-ud-din on the 22nd of July, 1899, brought the property to sale in execution of his own decree and purchased it himself. He obtained formal possession on the 21st of

(1) (1886) I. L. R., 15 Calc., 521. (2) (1900) I. L. R., 25 Bom., 337.

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BHAGWAN DAS v. RAJ NATH

February, 1900 In 1904 the plaintiff, Raj Nath, attached the property, formal possession of which had been obtained by Nizam-ud-din, and the actual possession of which was with Bhagwan Das and Durga Prasad in execution of a simple money decree against Nizam-ud-din Bhagwan Das and the representatives of Kirpa Dayal filed objections under section 278 of the Civil Procedure Code of 1882 Those objections were disallowed on the 4th of July 1904 Durga Prasad took no objections The plaintiff got the property sold and purchasing it himself, obtained formal possession on the 19th of October, 1904 He then, on the 9th of October, 1909, instituted a suit for actual possession of the property against Bhagwan Das and Durga Prasad The relief sought by him is that the defendants may be ejected from the property and the plaintiff put in proprietary possession thereof that if the defendants be allowed to redeem they should pay Rs 2,250 the amount due to the plaintiff and that the mesne profits for the past three years may be awarded The court of first instance gave the plaintiff a decree for possession with mesne profits with the condition that the defendants should be allowed to retain possession of the property provided they paid Rs 2 250 without fixing any period for the payment of that sum Two appeals were preferred from the decree of the first court one by Durga Prasad and the other by Bhagwan Das The court of first appeal allowed the appeal of Durga Prasad on the ground that as he had taken no objection under section 278 he was not bound by *section 283 of the Code of Civil Procedure of 1882* and that as he was in possession of the property as the representative of Kirpa Dayal the only remedy which the plaintiff as the representative of Nizam-ud-din had against him was a suit for foreclosure and that as the suit brought by the plaintiff against Durga Prasad was not a suit for foreclosure it must stand dismissed Regarding the appeal of Bhagwan Das the lower appellate court came to the following conclusion Bhagwan Das objected under section 278 of Act XIV of 1882 His objection was overruled and the court came to the conclusion that the property which was in his possession was liable to sale in execution of the decree of Nizam-ud-din and his remedy was if he was dissatisfied with that order to have instituted a suit under section 283 As he did not do so the order of the court, dated the 4th of July 1904 became final

between him and the plaintiff. The court found that in this view of the case Bhagwan Das was the representative of Kirpa Dayal a puisne mortgagee and that the plaintiff was the representative of Nizam-ud-din the prior mortgagee and that on payment of the money due to Nizam-ud-din i.e., such part of Rs. 2,250 as was proportionate to the amount of the property in his possession Bhagwan Das would be entitled to retain possession of the property. The lower appellate court also fixed no period for the payment of the money. It also gave the plaintiff a decree for mesne profits for three years. Bhagwan Das comes to this court in second appeal and the points argued are that the order of the 4th of July 1904 was passed without jurisdiction and that therefore it may be treated as a nullity and that the possession of the appellant and his predecessors which began on the 20th of June 1891, ripened by prescription into ownership and disentitled the plaintiff from succeeding in a suit for possession and that the order as to mesne profits passed against him (Bhagwan Das) is incorrect. In support of the first contention the learned counsel for the appellant relies upon *Badri Prasad* v. *Muhammad Yusuf* (1), *Jugobundhoo Bose* v. *Sachya Bibee* (2), *Monmohiney Dassee* v. *Radha Kristo Dass* (3) and an unreported ruling of this court in Second Appeal No. 751 of 1874 decided on the 25th of July, 1874. The substance of his argument is that, under sections 278, 279 and 281 of Act XIV of 1882 an executing court has jurisdiction only to determine the question of possession and that if such court passes an order under section 281 without going into the question of possession that order is *ultra vires* and without jurisdiction. The learned advocate for the respondent in answer to the point taken by the learned counsel for the appellant says that it is not correct to say that an executing court in dealing with an objection taken to the execution of a decree under the sections of the Code already referred to has no jurisdiction, unless that court goes into the question of the possession of the property held either by the judgement-debtor or the objector. That court according to the contention of the learned advocate for the respondent has jurisdiction either to allow or disallow the objection and if that court does not go into the question of possession it only does an act which is

(1) (1876) I. L. R., 1 All., 381. (2) (1871) 8 B. L. R., App., 9.
(3) (1902) I. L. R., 29 Calc., 543.

wrong, but which is within the jurisdiction of that court In support of his arguments the learned advocate for the respondent relies on *Sardhari Lal* v *Ambika Pershad* (1) and *Malkarjun* v *Narhari* (2) He submits that the ruling in 8 B L R, App 39 so far as it lays down that an order under section 246 of the Code of Civil Procedure of 1859, corresponding to section 281 of the Code of 1882, without dealing with the question of possession is a nullity, is not, in view of the rulings of their Lordships of the Privy Council in I L R, 15 Calc, 521, and I L R, 25 Bom, 337, a correct exposition of the law Regarding I L R, I All, 381, he says that it does not lay down that an order passed by an execution court under section 246 of the Code of Civil Procedure of 1859 without dealing with the question of possession is without jurisdiction We have carefully gone through sections 278 279, 280 and 281 of the Code of Civil Procedure of 1882, and we have no doubt that an objector may raise an objection to the attachment not only on the ground that he is in possession of it but also on the ground that he has an interest in the property attached, and we have no doubt that having regard to the language of those sections when an executing court disallows the claim of an objector under section 281, the court has jurisdiction to do so notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection on some other ground The result of our finding is that the order of 4th July 1904 is conclusive between the parties, and it cannot now be contended that Nizam ud din is not the owner of the property under the sale in execution of his own decree subject, of course to the equities in favour of the puisne mortgagee, or his representative, who was no party to the suit brought by Nizam ud din. The contention of the learned counsel for the appellant that the order as to mesne profits is wrong is in our opinion having regard to the circumstances of the case a valid contention The plaintiff in this case represents the prior mortgagee and the defendant is a representative in interest of a puisne mortgagee That being the relation between the parties the question of mesne profits cannot arise on any account As the property in dispute was first sold in execution of a decree obtained by Kirpa Dayal and others with the consent of Nizam ud din, and as the sale proceeds were applied to the satisfaction of Nizam ud din's own decree and as only a portion of

(1) (1895) I L R, 15 Calc 521 (2) (1901) I L R 25 Bom 337.

his decree remained unsatisfied in equity Nizam ud din or the plaintiff who is the representative in interest of Nizam ud din is entitled to put the property up to sale in accordance with the order passed on the 4th of July 1904 for the recovery of the balance only to which Nizam ud-din was entitled Moreover the plaintiff as the representative in interest of Nizam ud din is entitled only to proceed with the realization of a share of that balance proportionate to the share of the property which remained in the possession of Bhagwan Das after the success of the pre emption suit by Durga Prasad against him That being so it is desirable to have findings on the following two points —

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(1) What was the balance which remained due to Nizam ud din on the 22nd of July 1899, after the satisfaction of the bulk of his decree from the proceeds of the sale held on the 20th of June, 1891 ?

(2) What is the proportionate value of the property which remained in the possession of Bhagwan Das after the success of the pre emption suit by Durga Prasad against him as compared with the value of the entire property mortgaged to Nizam ud din on the 5th of August 1888 ?

The court below will be at liberty to take such additional evidence as the parties may adduce Ten days will be allowed for objections on return of the findings

Issues remitted

1912 February

Before Mr Justice Karamat Husain and Mr Justice Tudball

JWALA PRASAD (DEFENDANT) v ACHCHEY LAL AND OTHERS (PLAINTIFFS) *

Act No XV of 1877 (Indian Limitation Act) section 19—Mortgage—Redemption—Limitation—Acknowledgement

Held that an acknowledgement of the title of the mortgagor made by only one of two mortgagees would not avail to save the mortgagor s right to redeem being barred by limitation where the mortgage was a joint mortgage and incapable of being redeemed piecemeal *Dharma* v *Balmakund* (1) followed

The facts of this case were as follows —One Kuro mortgaged certain property to Sewa Ram and Daya Ram on the 10th of February, 1838 for R 49 The plaintiffs were the purchasers of the

* First Appeal No 120 of 1911 from an order of Girraj Kishore, Judge of the Small Cause Court exercising the powers of a Subordinate Judge of Aligarh, dated the 11th of August 1911

(1) (1896) I L R, 18 All 488

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equity of redemption. The defendant was the representative of the mortgagees. The plaintiffs sought to redeem the mortgage. The defence, *inter alia*, was limitation. The court of first instance dismissed the claim, holding that it was barred by limitation and that an acknowledgement made in 1850 at the verification of the khewat, which was set up by the plaintiffs as saving limitation, was not proved by the original settlement record. On appeal the learned Subordinate Judge was of opinion that the copy that was filed was sufficient to prove the acknowledgement, and, reversing the decree of the court of first instance, remanded the case under order XLI, rule 23. The defendant appealed to the High Court.

Munshi *Gobind Prasad*, for the appellant:—

As the mortgage deed was executed in 1838 it was governed by the old Limitation Act; the present Limitation Act has no retrospective effect. Reliance was placed on *Kaunsilla* v. *Ishri Singh* (1). Acknowledgement is recognized in the Limitation Act of 1859 to save limitation and it applies to deeds executed prior to its passing: *Zaib-un-nissa Bibi* v. *The Maharaja of Benares* (2). The copy of the khewat does not prove an acknowledgement nor is it admissible under section 19 of the Limitation Act.

Pandit *Mohan Lal Sandal*, for the respondents:—

The original khewat of 1850 belonging to a pre-mutiny period, the copy which comes from the Collectorate of Muttra is admissible. Sections 61, 63, 65 (*e*) and 74 of the Evidence Act make it admissible. The presumption under section 90 of the Evidence Act will apply to the case of a copy: *Ishri Prasad Singh* v. *Lalli Jas Kunwar* (3). Further section 114 of the Evidence Act will raise the presumption that the signatories of the khewat signed the khewat.

[The court having sent for the settlement record of 1850, went through it and found out that only one of the co-mortgagees verified the khewat, though it purported to be signed by both of them.]

Munshi *Gobind Prasad* was not heard in reply.

KARAMAT HUSAIN and TUDBALL, JJ.:—One Kure was originally the owner of the property in suit. He mortgaged it with possession to Sewa and Daya Ram on the 10th of February, 1838,

(1) (1910) I. L. R., 32 All., 499. (2) (1911) 8 A. L. J., 1872.

(3) Weekly Notes, 1900, p. 82.

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for Rs 49 The plaintiffs are the representatives in interest of the mortgagor Kure and the defendants are the representatives in interest of the mortgagees Sewa and Daya Ram The suit was instituted on the 22nd of June 1910 In paragraph 4 of the plaint it was alleged that in the settlement made in 1257 Fasli corresponding to 1850 A D an acknowledgement was made by Sewa and Daya Ram which gave the plaintiffs a fresh starting point for limitation One of the pleas raised in defence was that the suit was barred by limitation That plea found favour with the court of first instance which dismissed the claim On appeal the lower appellate court came to the conclusion that the entry in the settlement papers of 1257 Fasli corresponding to 1850 A D amounted to an acknowledgement and sent back the case for trial on the merits to the first court The lower appellate court in its judgement remarks —

"I am unable to agree with the learned Munsif in the view which he has taken regarding the law applicable to the admissibility of evidence in this case There is no doubt that the words *naql ul naql* (copy of a copy) are entered in the settlement record produced from the Collector's record room but the moharrir of the record room who brought the said record in the lower court and was examined on oath before that court stated that the said record was treated as original document and copies were issued from it and the copy produced by the village patwari shows that the papers of the settlement of 1283 Fasli were verified by Sewa and Daya Ram mortgagees and thus the entries to the settlement record of 1283 Fasli amount to an acknowledgement of the mortgagor's title and his right to redeem the mortgaged property and they gave the mortgagor a fresh starting point of limitation In other words by reason of the verification of the settlement record of 1283 Fasli by the mortgagees the period prescribed for the suit for redemption should be computed from the date when the mortgagees verified the papers in the said settlement record and thus the plaintiff's claim is within time

It is to be noticed that the plaintiffs very clearly based their claim upon the entry in the settlement papers of 1257 Fasli, corresponding to 1850 A D, and that the entries in the settlement papers of 1257 Fasli were the only entries upon which reliance was placed in the court of first instance It is also to be noticed that in the appellate court the appellant made an application on the 2nd of June 1911 and in that application he asked the court to send for the settlement papers (*misil bandobast*) of 1257 Fasli only He never applied to have the settlement papers of 1283 Fasli sent for at all That being so, the reference by the lower

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appellate court to the settlement papers of 1283 Fasli must be taken to be incorrect In the first place those papers were not in evidence before that court In the second place the originals of those papers were not proved to have been lost In the third place according to the statement of the patwari one of the mortgagors, Sewa, was dead at that time and the name of his minor son, Ram Chandar, under the guardianship of his mother Musammat Lado was entered and there could have been no verification of the entry in 1283 Fasli by Sewa Coming to the entry in the settlement papers of 1257 Fasli we find that it is a copy the original of which was lost during the mutiny of 1857 At the end of the copy there are copied the signatures of Sewa, mortgagee and Daya Ram, son of Puran, mortgagee, but in the certificates signed by the Settlement Officer on the 24th of August, 1850, and the 16th December 1850, the names of two Daya Rams appear as the persons who verified that paper There is no mention of the name of Sewa in either of the two certificates Under these circumstances the utmost that could be presumed under section 114 of the Indian Evidence Act would be that Daya Ram did verify the khewat and sign it provided he be the same Daya Ram whose name appears as the mortgagee Under that section we cannot possibly presume that that document was either verified by Sewa or signed by him and the copy before us does not show that he signed his name on the original The utmost that in the circumstances of the case we can presume is that one of the two mortgagees only made an acknowledgement It has been held in *Dharma* v *Balmakund* (1) that an acknowledgement of the title of the mortgagor made by only one of the two mortgagees would not avail to save the mortgagor's right to redeem being barred by limitation where the mortgage was a joint mortgage and incapable of being redeemed piecemeal We are therefore, of opinion that the suit is barred by limitation For the above reasons we set aside the order of the lower appellate court and restore the decree of the court of first instance with costs in all courts

Appeal decreed

(1) (1896) I L R 18 All, 403

1912
February

Before Mr Justice Sir Henry Griffin and Mr Justice Chamier

HIRA SINGH AND ANOTHER (PLAINTIFFS) v MUSAMMAT AMARTI (DEFENDANTS) *

Act No IX of 1908 (Indian Limitation Act), section 31—Mortgage—Suit for sale—Limitation—Act No X of 1897 (General Clauses Act), section 10

The special period of limitation for suits for foreclosure or for sale by a mortgagee prescribed by section 31 of the Indian Limitation Act 1908 namely two years from the date of the passing of the Act expired on a Sunday *Held* that a suit for sale to which section 31 applied instituted upon the following Monday was within time *Shevdas Daulatram Marwadi v Narayenrolal Asaji* (1) dissented from

The facts of this case were as follows —

This appeal arises out of a suit on a mortgage bond alleged to have been executed on the 25th January 1881 by Nathu Singh and Kallu who are now represented by Musammat Amarti, defendant No 1 The suit was filed on the 8th August 1910 the 7th August being a Sunday The court of first instance decreed the plaintiffs' suit Musammat Amarti defendant No 1, appealed to the lower appellate court One ground taken in appeal was that the suit was barred by limitation The lower appellate court held that as the courts were closed on the 7th August, 1910, the last day of limitation the suit having been filed on the 8th August, 1910, the day on which the courts reopened was within time The appeal was accordingly allowed.

The plaintiffs appealed to the High Court

On the question of limitation the arguments were as follows —

Babu *Sital Prasad Ghosh*, for the respondents —

The suit having been filed after the 'two years period of grace had expired, was clearly barred by limitation The period of limitation ' prescribed by the Act is to be found in the schedule The Legislature in view of the Privy Council ruling—*Vasudeva* v *Srinivasa* (2)—had provided an additional period of grace and this period could not be extended by any of the provisions applicable to the " period of limitation prescribed " The prescribed period of limitation is not to be found in section 31 of the Limitation Act but in the schedule annexed thereto *Dayaram Parasram Marwadi* v *Laxman Bunja Teli* (3)

* Second Appeal No 725 of 1911 from a decree of A W R Cole Additional Judge of Aligarh dated the 19th of June 1911 reversing a decree of Abdul Hasan Munsif of Khurja dated the 27th of March 1911

(1) (1911) I L R 36 Bom 268　(2) (1907) I L R 30 Mad 426
(3) (1911) 13 Bom L R 284

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Section 4 of the Limitation Act is not applicable to section 31, for that section is a self contained provision and commences with the words ' notwithstanding anything in this Act or in the Indian Limitation Act of 1877 which clearly indicate that section 31 excludes the applicability of any other provision of the Limitation Act The only other proviso which can be relied on as authorizing the presentation of the suit on the following Monday (August 8th 1910) is section 10 of the General Clauses Act In the first place that section was not intended to refer to suits, and secondly by the proviso, the section was made inapplicable to proceedings to which the Limitation Act of 1877 applied The Act of 1877 having been repealed, all references to that Act must be read as references to the new Act of 1908 This principle was recognised by section 8 of the General Clauses Act *Shevdas Daulatram Marwadi v Narayeni ud Asrji* (1)

Mr *M L Agarwala*, for the appellants, in reply

The Bombay rulings did not give due effect to section 10 of the General Clauses Act The proviso to that section only excluded proceedings to which the Limitation Act of 1877 applied and there is absolutely no warrant for reading the words the Indian Limitation Act of 1908 for the words Indian Limitation Act of 1877 There is no provision in the new Act of 1908 analogous to the provision contained in section 158 of the new Civil Procedure Code, whereby any reference made in any Act to the repealed Act of 1877 could be taken to have been made to the new Act of 1908 Section 8 of the General Clauses Act would not authorize such reading, because it only says that any reference to a repealed provision should be construed as a reference to the re enacted provision It cannot be said that section 31 of the Act of 1908 is a re enacted provision substituted for a similar repealed provision Therefore the proviso to section 10 not applying the section itself would apply The word proceedings is wide enough to cover "suits and therefore the plaint though presented on Monday, August 8th 1910 was within time Section 10 simply embodies the general principle of law, namely that the law does not compel a man to do that which he could not possibly perform and there is nothing in the Limitation Act of 1908 to indicate that this general principle of law would not apply to section 31

(1) (1911) I L R, 36 Bom 268

Griffin J —This appeal arises out of a suit on a mortgage bond alleged to have been executed on the 20th January 1881 by Nathu Singh and Kallu who are now represented by Musammat Amarti defendant No 1 The suit was filed on the 8th August 1910 the 7th August being a Sunday The original bond was not produced The plaintiffs alleged that it was in the possession of defendants 2 to 4 and filed a copy Musammat Amarti defendant No 1 pleaded that the plaintiffs were not entitled to sue without first obtaining a succession certificate and that the original bond had been paid off In the court of first instance a succession certificate to collect a debt of Rs 500 in respect of the bond now in suit was filed by the plaintiffs No evidence was adduced by either party The court held that as the execution of the bond was not specifically denied in the written statement it must be held to have been admitted and decreed the plaintiffs' suit Musammat Amarti defendant No 1 appealed to the lower appellate court One ground taken in appeal was that the plaintiffs had not shown that they were entitled to produce secondary evidence of the bond in suit Another was that the suit was barred by limitation. *The lower appellate court held that as the debt* due on the bond in suit was over Rs 2 000, whereas the plaintiff had obtained a succession certificate in respect of a debt of Rs 500 only, the suit could not be maintained by the plaintiffs and must be dismissed. On the question of limitation the lower appellate court held that as the courts were closed on the 7th August, 1910 the last day of limitation the suit having been filed on the 8th August, 1910 the day on which the courts reopened, was within time The court further held that the execution of the bond was admitted by implication The question whether the plaintiffs were entitled to produce secondary evidence of the bond in suit does not appear to have been argued before the court below The appeal to that court having been allowed the plaintiffs come here in second appeal

I think the suit should not have been dismissed on the ground that the succession certificate held by the plaintiffs was not sufficient to cover the amount due on the bond in suit The proper procedure for the court to have adopted was to allow the plaintiffs sufficient time within which to obtain an extension of the certificate

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I also think that some evidence should have been required of the plaintiffs before admitting secondary evidence of the bond in suit The learned vakil on behalf of the respondent supports the decision of the court below on the ground that on the date on which the suit was filed—the 8th August 1910—the suit was barred by limitation

The question of limitation is one of some importance and is not free from difficulty The Limitation Act No IX of 1908 became law, so far as section 31 was concerned, on the 7th August, 1908 By section 31 of that Act it was enacted that a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of the Act or within sixty years from the date when the money secured by the mortgage became due whichever period expires first The two years expired on August 7th 1910 which was a Sunday The suit was filed on August 8th 1910 the present Limitation Act being then in force

Sections 3 and 4 of the Limitation Act No IX of 1908 are as follows —

3 Subject to the provisions contained in sections 4 to 25 (inclusive) every suit instituted appeal preferred and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed, although limitation has not been set up as a defence

4 Where the period of limitation prescribed for any suit appeal or application expires on a day when the court is closed the suit appeal or application may be instituted preferred or made on the day that the court reopens

At first sight it appears as if 'prescribed in section 4 should be understood as 'prescribed in the schedule' There is however ample authority for holding that section 5 of the Limitation Act of 1877 (now section 4 of the present Act) may be applied and proceedings not governed by the ordinary limitation law I need only refer to 23 All, 277, and 28 All, 48 and to the authorities collected at page 297 of Mitra s Limitation Act If the rule laid down in section 5 of Act No XV of 1877 may be applied to cases not governed by that Act it should also be held to apply to cases under the Limitation Act itself

Section 10 of the General Clauses Act lays down the same rule as section 4 of the Limitation Act It would appear that it was the intention of the Legislature that the rule should be of universal application In the case before us in the absence of any clear and unmistakable provision that the rule does not apply, I would hold

that the plaintiff is entitled to the benefit of section 4 of the Limitation Act

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Hira Lal v. Muhammad Ahsan

I regret I am unable to agree with the learned Judges of the Bombay High Court who in *Sheodas Daulatram Marwadi v. Narayen Dalad Agarwal* (1) have arrived at an opposite conclusion. They were of opinion that section 31 of the Limitation Act of 1908 provided a period of grace and that the special statutory provisions section 10 of the General Clauses Act and section 4 of the Limitation Act, did not apply to the case

In my opinion the time fixed for the institution of suits under section 31 is as much 'prescribed' as if suits under that section found place in the schedule. I would therefore allow the appeal and remand the case for decision to the court below, having regard to the observations set out above. The plaintiffs should be allowed an opportunity of producing evidence of facts which would entitle them to produce secondary evidence of the bond.

CHAMIER, J —I agree that the suit should not have been dismissed upon the ground that the succession certificate produced by the plaintiff was not in order. The plaintiff should have been given time to get the certificate amended or extended.

I agree also that some evidence should have been required of the plaintiff that the mortgage-deed was in possession of defendants 2 to 4 before the plaintiff was allowed to use a copy of the deed

On the question of limitation, I should like to say a few words. Section 31 of the Limitation Act 1908 provides that, notwithstanding anything contained in that Act or in the Limitation Act, 1877 in the territories mentioned in the second schedule (which include the United Provinces) a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of the Act

The last day of the two years was Sunday, August 7th 1910. The present suit was instituted on Monday, August 8th. The question is whether the suit was within time with reference to the provisions of section 4 of the Limitation Act or section 10 of the General Clauses Act. It is contended on behalf of the defendant that section 4 of the Limitation Act does not apply, that it should be read with section 3 and that the words "period of limitation prescribed

(1) (1911) I L R 36 Bom. 268

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scribed" in section 4 mean period of limitation prescribed in the first schedule to the Act. There is a good deal to be said for this view, but it has been held by this court in several cases that the provisions of what is now section 4 apply to periods of limitation prescribed by other Acts.

Supposing however that section 4 does not apply to this case for the reason that the period is not "prescribed" within the meaning of section 4 of the Act, I am of opinion that the case is covered by section 10 of the General Clauses Act. The last mentioned section runs as follows:—

10 (1) Where by any Act of the Governor General in Council or Regulation made after the commencement of this Act any act or proceeding is directed or allowed to be done or taken in any court or office on a certain day or within a prescribed period, then if the court or office is closed on that day or the last day of the prescribed period the act or proceeding shall be considered as taken or done in due time if it is done or taken on the next day afterwards on which the court or office is open.

Provided that nothing in this section shall be taken to apply to any act or proceeding to which the Indian Limitation Act, 1877 applies.

The defendant contends that as the Limitation Act, 1877, has been replaced by the Limitation Act, 1908 the proviso should be read as if the figures in it were '1908.'

She relies in the first instance upon section 8 of the General Clauses Act. It appears to me that that section does not apply at all to the case in hand. Section 31 of the Limitation Act 1908 was enacted to meet a peculiar state of affairs. It is an entirely new provision and cannot in any way be regarded as the re-enactment with modifications of any provision of the Limitation Act of 1877. Sir M. D. Chalmers's note to section 8 of the General Clauses Act (Edition of 1899) is as follows:—

This section is new and is taken from section 38 (1) of the Interpretation Act, 1889. It enacts as a general rule a provision which is commonly inserted in Acts (see for instance section 3 of the Code of Criminal Procedure, 1898), but which is sometimes forgotten. Its operation may be illustrated as follows:— Suppose the Acts amending the Indian Penal Code were consolidated and in the new Code section 188 (disobedience to orders of public servants) became section 200. Then any Act or document which referred to section 188 of the old Code would have to be construed as referring to section 200 of the new Code.

This note seems to me to state accurately the object and scope of the section.

Had the Limitation Act of 1908 contained a provision corresponding *to the first few words of section 2 of the Limitation Act,*

1877 as that section stood at the date of the repeal of the A[illegible] or to section 3 of the Code of Criminal Procedure, 1898, [illegible] 155 of the Code of Civil Procedure, 1908, then it would have been permissible to read the proviso to section 10 of the General Clauses Act as referring to the Limitation Act of 1908. [illegible] I am of opinion that this cannot be done. I see no reason why the words "prescribed period" in section 10 of the General Clauses Act should not be held to apply to the period prescribed by section 31 of the Limitation Act of 1908. The defendants rely upon the decision of the Bombay High Court in *Shevlas Dulatram Marwadi v. Narayenvalad Asiji* (1). In that case the court gave no reasons for holding that section 10 of the General Clauses Act did not apply to a case like this. The reason given in the order by which the case was referred to the High Court is that the proviso to section 10 of the General Clauses Act should now be read as referring to the Limitation Act of 1908 on account of the provisions of section 8 of the General Clauses Act. For the reasons already given by me I am of opinion that section 8 does not apply to the case.

It was suggested that the proviso to section 10 was and is surplusage and that apart from it the preceding part of the section does not apply to any case governed by the Limitation Act for the time being in force. If the opening part of the section was not intended to apply to any case governed by the Limitation Act, it was because it was supposed that sufficient provision had already been made in the Limitation Act itself. The proviso to section 10 of the General Clauses Act still excludes from that section all cases which are covered by provisions of the Limitation Act of 1908 re-enacting with or without modification provisions of the Limitation Act, 1877. I see no reason for reading the provisions of the first paragraph of section 10 of the General Clauses Act in any but their ordinary and natural sense. They seem to me to be wide enough to cover the present case if it is not governed by section 4 of the Limitation Act.

For the above reasons I am of opinion that this suit was filed within time whether it is governed by section 4 of the Limitation Act or by section 10 of the General Clauses Act. I agree in the order proposed by my learned colleague.

(1) (1911) I. L. R., 36 Bom. 268.

1912

HIRA SINGH v MUSAMMAT AMARTI

BY THE COURT—The appeal is allowed The case will go back to the court below for decision having regard to the observations made in our judgment The plaintiffs will be allowed an opportunity of adducing evidence of the facts entitling them to produce secondary evidence of the bond Costs in this appeal will be costs in the cause Defendants will be entitled to produce rebutting evidence

Appeal allowed Cause remanded

1912
February 29

Before Mr Justice Karamat Husain and Mr Justice Tudball

MAKHAN LAL (PETITIONER) v SRI LAL (OPPOSITE PARTY)*

Act No XII of 1887 (Bengal N W P and Assam Civil Courts Act) sections 8 39—Act No III of 1907 (Provincial Insolvency Act) sections 43 46 3—Appeal—Jurisdiction—Effect of order of District Judge assigning work to Additional Judge

Where an Additional District Judge sentenced an applicant for insolvency under section 43 of the Provincial Insolvency Act 1907 acting in the matter under an order of the District Judge assigning the particular class of work to him under section 8 of the Bengal N W P and Assam Civil Courts Act, 1887 it was held that an appeal from the Additional Judge s order lay to the High Court and not to the District Judge

The facts out of which this appeal arose were briefly, as follows —

One Makhan Lal applied to the District Judge of Aligarh to be adjudicated an insolvent The District Judge transferred that application to the file of the Additional District Judge One Sri Lal was one of the opposing creditors The Additional Judge found the applicant guilty under section 43 (2) of the Provincial Insolvency Act and sentenced him to one month s simple imprisonment Makhan Lal appealed to the High Court

Pandit *Jagjiwan Nath Takru*, for the respondent raised a *preliminary objection that the appeal lay to the* District Judge and not to the High Court He submitted that the court of the Additional Judge was inferior to that of the District Judge, *vide* section 39 of the Bengal Assam and N W P Civil Courts Act 1887 *In section 3 of that Act the different courts have been named in* order of their inferiority An appeal from an order of a court subordinate to the District Judge lay to the District Judge—*vide* section 46 of the Insolvency Act —and no appeal lay to the High Court.

* First Appeal No 112 of 1911 from an order of A W R Cole, Additional Judge of Aligarh dated the 23rd of September 1911

Mr *R K Sorabji* for the appellant here referred to section 20 of the Bengal N W P and Assam Civil Courts Act Under section 3 of the Insolvency Act no court except that of the District Judge could hear insolvency petitions It was only when there was a special notification by the Government to that effect that any other court could hear such petitions The Additional District Judge could only have a power to try such cases if his court were a court of concurrent jurisdiction with that of the District Judge The words used in the Act were ' District Court In dealing with cases under section 43 the court had power as a criminal court, and the appellant should have been allowed a fair chance and opportunity to explain his conduct

Pandit *Jagjiwan Nath Tal ru* for the respondent

Section 47 of the Civil Courts Act gives general powers to District Judges in the exercise of their original jurisdiction and they have in the exercise of such jurisdiction power to transfer cases Section 8 (2) gives to Additional Judges the same powers as to the District Judge

KARAMAT HUSAIN and TUDBALL, JJ —This is an appeal from the order of the Additional District Judge of Aligarh, whereby he, under section 43 of the Provincial Insolvency Act (Act III of 1907) sentenced the appellant to simple imprisonment for one month in that he had fraudulently or vexatiously concealed or refused to produce certain books of account before the Receiver appointed in the matter of his insolvency A preliminary objection is taken that the appeal does not lie to this Court but to the court of the District Judge It is urged that the court of the Additional District Judge is a court subordinate to the District Court as contemplated by section 46 of the Act and that the appeal under that section lies to the District Court In this connection we may note that one of the grounds of appeal is that the Additional District Judge had no insolvency jurisdiction in that he has not been invested by the Local Government with powers under the proviso to section 3 clause (1) of the Act In our opinion neither of these two pleas has any force It is true that for certain purposes an Additional District Judge is subordinate to the District Judge It is equally true that the Local Government has not issued any notification in respect to the Additional District Judge of Aligarh under section 3, clause I of the Act Under that section

1912

MAKHAN LAL v SRI LAL.

of the Act the District Courts are the courts which have jurisdiction under the Act The District Court means the principal Civil Court of original jurisdiction of the district But under section 8 of the Civil Courts Act (Bengal, N W P and Assam) Additional District Judge appointed under clause (1) of the section shall discharge any of the functions of a District Judge which the District Judge may assign to them and in the discharge of those functions *they shall exercise the same powers as a District Judge* In the present case the District Judge having assigned one of the functions of a District Judge to his Additional District Judge the latter has exercised the same powers as the former would have done but for his order Under section 20 of the same Act the appeal therefore lies to this court The lower court, therefore, was in the present matter not subordinate to the District Court in the manner contemplated in sections 3 and 46 of the Insolvency Act The lower court, therefore, was part and parcel of the District Court It had jurisdiction, and the appeal lies to this Court There remain only the merits of the case for consideration The applicant was called upon to produce his books He produced nearly all In regard to the balance he stated that he had previous to the insolvency proceedings handed them over to three of his creditors Apparently his case was that an attempt was made at first to come to a settlement with all his creditors, and for that purpose he had made over these books to these three The opposite party, Sri Lal, is one of *these three and it was he who applied* to the court to compel the appellant to produce the books The appellant and Sri Lal were the only two persons examined by the lower court The former swore that he had handed over the books and the latter denied it The court also took into evidence a report by the Receiver that the other two creditors named had also denied receipt of the books from the appellant These persons were alive and could and ought to have been called and examined on oath The inquiry has in our opinion been far too meagre and summary, and the appellant should have a further opportunity of proving his allegation We therefore allow the appeal set aside the lower court's order and remand the case for full inquiry and decision according to law

The parties will abide their own costs of this appeal

Appeal allowed

Before Mr Justice Karamat Husain and Mr Justice Tudball

1912 March 1

GUR NANAK PRASAD (OBJECTOR) v JAI NARAIN LAL AND OTHERS (DECREE HOLDERS)

Hindu Law—Hindu widow—Reversioners—Decree fairly obtained against widow binding on reversioners although the widow did not contest the suit

A decree in a suit against a Hindu widow respecting property of her husband of which she is in possession as such widow may be binding on the reversioners notwithstanding that the widow did not contest the suit provided that the plaintiffs case was properly and fairly stated and the widow had reasonable opportunities of which she did not choose to avail herself of defending the suit

The facts of this case were as follows —

Sarabjit and Sheo Gobind sold the property in suit to Bhaiya Rajpal Singh on the 7th of December 1852 for Rs 275 On the same date Bhaiya Rajpal Singh entered into an agreement with the vendors that on payment of Rs 200 in any Jeth he would reconvey the property to the vendors After Bhaiya Rajpal Singh's death his son Suraj Bali, mortgaged the whole of that property along with some other property nominally to Rabsa Kunwar but really to her husband Suraj Bali also made a gift of that property to Musammat Adhar Kunwar Jai Narain and Raghunath Prasad, the representatives in interest of Sarabjit and Sheo Gobind, instituted a suit for redemption of the property transferred on the 7th of December 1852 In that suit he impleaded Adhar Kunwar and Rabsa Kunwar, whose husband was then dead The suit was defended by Adhar Kunwar only, and Rabsa Kunwar did not put in any appearance The court of first instance gave the plaintiffs a decree on the 30th of September 1907 entitling them to redeem the property on payment of Rs 200 to Adhar Kunwar Adhar Kunwar appealed against that decree but Rabsa Kunwar took no steps in appeal The appeal was withdrawn and the result was that the decree of the court of first instance entitling the plaintiffs to redeem on payment of Rs 200 to Adhar Kunwar became final Musammat Rabsa Kunwar died and the reversioners of her husband took possession of the property which was in possession of Rabsa Kunwar The plaintiffs decree holders deposited the money in court The reversioner Gur Nanak, objected on the ground that as he was no party to the decree it could not be enforced against him The objection was accepted by the court of

First Appeal No 121 of 1911 from an order of F D Simpson, District Judge of Gorakhpur dated the 29th of June, 1911

1912

GUR NANAK PRASAD v. JAI NARAIN LAL

first instance, which rejected the application for execution In appeal the lower appellate court came to the conclusion that the decree was fairly and properly obtained against Rabsa Kunwar and that the reversioners were bound It therefore allowed the appeal and sent back the case to the court of first instance for decision on the merits

The reversioner, Gur Nanak Prasad, appealed to the High Court

Munshi *Isuar Saran*, for the appellant

Munshi *Jang Bahadur Lal*, for the respondent

KARAMAT HUSAIN and TUDBALL, JJ—Sarabjit and Sheo Gobind sold the property in suit to Bhaiya Rajpal Singh on the 7th of December 1852 for Rs 275 On the same date Bhaiya Rajpal Singh entered into an agreement with the vendors that on payment of Rs 200, in any Jeth, he would reconvey the property to the vendors After Bhaiya Rajpal Singh's death his son, Suraj Bali, mortgaged the whole of that property along with some other property nominally to Rabsa Kunwar but really to her husband Suraj Bali also made a gift of that property to Musammat Adhar Kunwar Jai Narain and Raghunath Prasad the representatives in interest of Sarabjit and Sheogobind instituted a suit for redemption of the property transferred on the 7th of December 1852 In that suit they impleaded Adhar Kunwar and Rabsa Kunwar whose husband was then dead The suit was defended by Adhar Kunwar only and Rabsa Kunwar did not put in any appearance The court of first instance gave the plaintiffs a decree on the 30th of September 1907, entitling them to redeem the property on payment of Rs 200 to Adhar Kunwar Adhar Kunwar appealed against that decree but Rabsa Kunwar took no steps in appeal The appeal was withdrawn and the result was that the decree of the court of first instance entitling the plaintiffs to redeem on payment of Rs 200 to Adhar Kunwar became final Musammat Rabsa Kunwar died and the reversioners of her husband took possession of the property which was in possession of Rabsa Kunwar The plaintiffs decree holders deposited the money in court The reversioner, Gur Nanak, objected on the ground that, as he was no party to the decree it could not be enforced against him The objection was accepted by the court of first instance, which rejected the application for execution. In appeal the lower appellate court came to

the conclusion that the decree was fairly and properly obtained against Rabta Kunwar and that the reversioners were bound It therefore allowed the appeal and sent back the case to the court of first instance for decision on the merits The reversioner comes to this court in appeal and it is urged by his learned vakil that as the widow did not protect the estate of her husband by contesting the suit for redemption the decree is not binding on the reversioner In support of the proposition he refers to the following cases —*Nugender Chunder Ghosh* v *Sreemutty Dossee* (1), *Sant Kumar* v *Deo Saran* (2), *Sichit* v *Budhua Kuar* (3), *Jevan Lalju* v *Vetra* (4) and F A No 384 of 1910 decided by a Bench of this Court, on the 21st of February, 1912

1912

Gur Narayan Prasad v. Jai Narain Lal

Every case has to be decided with reference to its own particular facts and the rule laid down in one case does not apply to another case when its facts are different In the case before us the representatives of the mortgagors did all they could to have the suit fairly and properly tried They honestly disclosed all the facts which were necessary for the trial of the case They made Rabta Kunwar a defendant and they had the notice served upon her It was beyond their power to make her *contest* the suit and she did not do so because she as a sub mortgagee had no valid defence against them and there is nothing on the record and nothing is now put forward, to show that she had any good defence which she neglected to put forward against the plaintiffs In these circumstances we are of opinion that the decree which the plaintiffs obtained was obtained fairly and properly and was binding on the reversioner and the mere fact that the widow did not contest the suit is no reason to render the decree ineffectual against the reversioner There is no provision in the law of British India under which a plaintiff can force a widow to *contest* his claim and in the absence of such provision to hold that a decree properly and honestly obtained by a plaintiff against a Hindu widow is not binding on a reversioner unless the suit has been actually *contested* by the widow is to cast upon the plaintiff a duty which it is impossible for him to perform The reversioners have their remedy if any, against their own mortgagors The result is that we dismiss the appeal with costs

Appeal dismissed

(1) (1867) 8 W R P C 17
(2) (1886) I L R 8 All, 365
(3) (1886) I L R 8 All 423
(4) (1903) 5 Bom L R, 885

1912
March 1

Before Mr Justice Karamat Husain and Mr Justice Tudball

HET SINGH AND OTHERS (JUDGEMENT DEBTORS) *v* TIKA RAM (DECREE HOLDER) *

Civil Procedure Code (1908) section 148 order XXXIV rule 8—Mortgage—Redemption—Mortgage money not paid within time limited by decree—Power of court to extend time

Section 148 of the Code of Civil Procedure applies to cases in which the time fixed by the Code of Civil Procedure for the doing of some act is extended and not to the extending of the time fixed by a mortgage decree for the payment of a prior mortgage

The plaintiff in a suit for redemption of a mortgage obtained a decree which provided in the event of non payment not that he should be debarred from all right to redeem the mortgaged property but that his suit should be dismissed Owing to a *bona fide* mistake the plaintiff paid into court within the time limited less than the sum actually due

Held that the court had power under order XXXIV rule 8 of the Code of Civil Procedure to extend the time limited for payment of the full decretal amount

In this case one Khushal Singh mortgaged the property in suit to Bhagwant Singh on the 19th of November, 1889 He again mortgaged it to Tika Ram on the 2nd of January 1894 Bhagwant Singh brought a suit on his mortgage without impleading Tika Ram and got a decree on the 23rd of June 1900 in execution of which he bought the property on the 15th of August 1904 Tika Ram on the 7th of February 1910 got a decree to redeem the mortgage of Bhagwant Singh on payment of Rs 462 with interest The decree was in general terms and did not set out the amount of interest which Tika Ram had to pay It provided that if Tika Ram failed to pay up to the 15th of *August, 1904* his suit was to be dismissed The date is presumably wrong The 15th of August 1910, was the date fixed. The date of the mortgage in favour of Bhagwant Singh is also wrongly shown as *November 1899* instead of the 19th of November, 1889 On the 2nd of August 1910 Tika Ram paid into the court Rs 2 278 calculating interest from *November 1890* The sum was less than the full amount due on the mortgage if calculated from the 19th of November 1889 The judgement-debtors taking advantage of the mistake applied on the 21st of November, 1910 that Tika Ram's claim be dismissed on the ground of the

* Second Appeal No 758 of 1911 from a decree of A Sabonadiere District Judge of Aligarh dated the 2nd of May 1911 confirming a decree of Jagat Narain Additional Subordinate Judge of Aligarh, dated the 16th of January, 1911

provision in the decree and that costs be awarded to the applicants The court of first instance acting under section 148 Civil Procedure Code enlarged the time for payment up to the 15th of February 1911 and rejected the application

In appeal two points were considered —

(1) Could the time for the payment of the money due on the mortgage of Bhagwant Singh be extended under section 148 Civil Procedure Code ?

(2) Was good cause shown for extending the time ?

The lower appellate court found that the time for the payment of money under a mortgage decree could be extended under section 148 Civil Procedure Code and that good cause was shown for the extension On the above findings the lower appellate court upheld the order of the first court

The defendants appealed to the High Court

Munshi *Gulzari Lal*, for the appellants

Mr *G W Dillon* for the respondent

KARAMAT HUSAIN and TUDBALL, JJ —One Khushal Singh mortgaged the property in suit to Bhagwant Singh on the 19th of November 1889 He again mortgaged it to Tika Ram on the 2nd of January, 1894 Bhagwant Singh brought a suit on his mortgage without impleading Tika Ram and got a decree on the 23rd of June 1900 in execution of which he bought the property on the 15th of August, 1904 Tika Ram on the 7th of February 1910 got a decree to redeem the mortgage of Bhagwant Singh on payment of Rs 462 with interest The decree was in general terms and did not set out the amount of interest which Tika Ram had to pay It provided that if Tika Ram failed to pay up to the 15th of August 1904 his suit was to be dismissed The date is presumably wrong The 15th of August 1910 was the date fixed The date of the mortgage in favour of Bhagwant Singh is also wrongly shown as November, 1890, instead of the 19th of November 1889 On the 2nd of August 1910 Tika Ram paid into the court Rs 2 278 calculating interest from November 1890 The sum was less than the full amount due on the mortgage if calculated from the 19th of November 1889 The judgement-debtors taking advantage of the mistake applied on the 21st of November 1910 that Tika Ram's claim be dismissed on the ground of the

1912

HET SINGH
v.
TIKA RAM

provision in the decree and that costs be awarded to the applicant. The court of first instance acting under section 148 Civil Procedure Code, enlarged the time for payment up to the 15th of February 1911, and rejected the application.

In appeal two points were considered —

(1) Could the time for the payment of the money due on the mortgage of Bhagwant Singh be extended under section 148, Civil Procedure Code?

(2) Was good cause shown for extending the time?

The lower appellate court found that the time for the payment of money under a mortgage decree could be extended under section 148 Civil Procedure Code and that good cause was shown for the extension. On the above findings the lower appellate court upheld the order of the first court

In second appeal it is urged that section 148 Civil Procedure Code, has no application that an executing court has no power to extend the time fixed by the mortgage decree for the payment of a prior mortgagee and that no good cause was shown for the extension of the time for the payment. We are of opinion that section 148 Civil Procedure Code applies to cases in which is extended the time fixed by the Code of Civil Procedure for the doing of some act and not to the extending of the time fixed by a mortgage decree for the payment of a prior mortgage

In the decree in a redemption suit the court may under order XXXIV, rule 8, upon good cause shown and upon such terms if any as it thinks fit from time to time postpone the day fixed for payment The learned vakil for the appellants concedes this but urges that time can be extended when the decree in a redemption suit is drawn up in the form prescribed by law, but that if it provides that in case of failure to pay within the period fixed by the decree the suit shall stand dismissed no execution can be granted in contravention of the provision in the decree We are unable to accept the contention. The decree in the case before us was a decree in a redemption suit and the provision therein that in case of failure to pay the plaintiff's suit shall stand dismissed was carelessly put in for the provision that the plaintiff shall be debarred from all right to redeem the mortgaged property inasmuch as the suit was for redemption and the dismissal of such a

suit had the effect of debarring the plaintiff from all right to redeem.

1912

HET SINGH v TIKA RAM

We are satisfied that Tika Ram in calculating the interest from November, 1890, made a *bonâ fide* mistake which constituted a good cause for the extension of the time for the payment of the prior mortgage of the 19th of November 1889 We therefore uphold the decree of the lower appellate court, but not for the reasons set out by that court in its judgement The result is that we dismiss the appeal with costs

Appeal dismissed

1912
March 9

Before Mr Justice Karamat Husain and Mr Justice Tudball

GUR CHARAN DAS (DEFENDANT) v HAR SARUP (PLAINTIFF)*

Act (Local) No 1 of 1904 (General Clauses Act) section 23—Act (Local) No 1 of 1900 (United Provinces Municipalities Act) section 187—Municipality—Powers of Government to frame rules—Rules as to Municipal elections—"Previous publication — Competent court

Certain draft rules relating to municipal elections were published in the local Gazette These draft rules were then considered by the Government in connection with such criticisms and objections as had been presented and finally a set of rules was published in the Gazette as having been made under section 187 of the United Provinces Municipalities Act 1900

Held that such rules were none the less validly passed because in some details they differed from the draft rules previously published

The rules so made provided that a municipal election might be questioned by means of a petition presented to a competent court

Held that the expression "competent court so used meant a Civil Court of competent jurisdiction with reference to the valuation given by the petitioner in his petition

This was a suit instituted in the court of a Munsif praying for a declaration that a certain municipal election was invalid The suit was thrown out by the Munsif upon the ground that he had no jurisdiction to entertain it The plaintiff appealed and the Additional District Judge of Meerut coming to the conclusion that the Munsif had jurisdiction to try the suit remanded it to his court for trial From that order of remand the defendant appealed to the High Court his principal plea being the invalidity of the rules framed by the local Government under which the right of questioning a municipal election by means of a petition presented to a "competent court" was granted

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* First Appeal No 117 of 1911 from an order of C E Guterman Additional Judge of Meerut dated the 31st of August 1911

1912

Gur Charan Das v. Har Sarup

Mr *C Dillon* and Munshi *Girdhari Lal Agarwala*, for the appellant

Munshi *Gobind Prasad*, for the respondent

Karamat Husain and Tudball JJ —This was a suit instituted in the court of a Munsif for a declaration that a certain municipal election was invalid The learned Munsif decided that he had no jurisdiction to entertain the suit There was an appeal to the learned Additional District Judge of Meerut, who came to the conclusion that the Munsif had jurisdiction to try the suit and remanded the case to his court for trial on the merits An appeal is preferred to this Court from the order of remand, and the contention of the learned counsel for the appellant is that under section 187 of the Municipalities Act, No 1 of 1900, a previous publication of the rules finally made by the local Government is a condition precedent to the validity of such rules His contention is that the draft of these rules was published in the local Gazette of these provinces on the 27th of February, 1909 and that in that draft a rule No 39 ran as follows —' The validity of an election may be questioned by a petition to the District Magistrate on the ground etc that when that rule was published in the official Gazette of these provinces on July the 30th, 1910 it assumed the following form — Rule 42 clause 1 The validity of an election made in accordance with these rules shall not be questioned except by a petition presented to a competent court within fifteen days after the date on which the election was held by a person or persons enrolled,' &c, and that as there was no second publication of the amended rule wherein the expression " District Magistrate was replaced by the expression " competent court the rules as published on July the 30th 1910 are not validly published rules The term previous publication' has been defined in the General Clauses Act (Local) No 1 of 1904 section 23 The last clause of that section is in the following terms —' The publication in the Gazette of a rule or bye law purporting to have been made in the exercise of a power to make rules or bye-laws after previous publication shall be conclusive proof that the rule or bye-law has been duly made This section defines what is meant by previous publication. In the case before us the draft rules were published in the official local Gazette of 27th February,

1909, and notice was given to the public that the rules would be taken into consideration by the local Government on or after the 15th of May 1909 and in pursuance of that notice after considering all criticism the rules as already mentioned were published in the official Gazette of these provinces on the 30th of July 1910 which gave the power of hearing the petitions questioning the validity of an election to a competent court The publication therefore was a valid publication of the rules, and the rules published in the official Gazette of these provinces on the 30th of July, 1910, no doubt, have the force of law

The second question is as to which court is a competent court within the meaning of rule 42 published on the 30th of July, 1910 We have no doubt that the expression "competent court" within the meaning of that rule means a Civil Court of competent jurisdiction with reference to the valuation given by the petitioner on his petition

The question of the validity of the election is purely a civil question and the words "District Magistrate" have been intentionally replaced by the words "competent court"

The result is that we dismiss the appeal with costs

Appeal dismissed

REVISIONAL CIVIL

1912 March 11

Before Mr Justice Banerji

IN THE MATTER OF THE PETITION OF NAWAL SINGH

Criminal Procedure Code section 476— Court —Civil Procedure Code (1908) section 115—Revision—Inexpediency of order no ground for revision on the civil side

The word "court" in section 476 of the Code of Criminal Procedure includes the successor of the Judge before whom the alleged offence was committed *Bahadur* v *Eradatullah Mallick* (1) followed

Whether a particular order is expedient or not is not a ground on which the High Court can interfere in revision under section 115 of the Civil Procedure Code

One Sumat Prasad brought a suit against Nawal Singh and others on two promissory notes This was suit No 200 of 1906 In answer to the claim Nawal Singh denied the genuineness of one of the promissory notes and pleaded payment of the other and produced a receipt As regards both the promissory notes the

* Civil Revision No 145 of 1911

(1) (1910) I. L. R 37 Calc., 642.

1910

GUR CHARAN DAS v HAR SARUP

Mr *C Dillon* and Munshi
appellant

Munshi *Govind Prasad*, for t

KARAMAT HUSAIN and TUD
stituted in the court of a Munsif f
municipal election was invalid I
he had no jurisdiction to entertain
to the learned Additional District
the conclusion that the Munsif had
remanded the case to his court for
is preferred to this Court from the
tention of the learned counsel for
section 187 of the Municipalities
publication of the rules finally made
condition precedent to the validity of
is that the draft of these rules was pu
of these provinces on the 27th of Febr
draft a rule No 39 ran as follows —
may be questioned by a petition to
the ground etc that when that ru
official Gazette of these provinces o
assumed the following form — 'Rule
of an election made in accordance wi
questioned except by a petition present
within fifteen days after the date on whi
a person or persons enrolled,' &c and th
publication ... District

tioner

Mr *A E Ryves*, for the Crown (opposite ... competent court

BANERJI J —This is an application for the ... directing ... are not validly
made by the Subordinate Judge of Saharanpur, ... has been de-
cution of the applicant for the offences mentioned in ...4, section 23
It appears that one Sumat Prasad brought a suit against ... rms — 'The
cant and others on two promissory notes This was suit ... ng to have
of 1906 In answer to the claim the applicant denied the ... b... bye-laws
ness of one of the promissory notes and pleaded payment ...
amount of the other and produced a receipt As regards b...
promissory notes the court of first instance held the defen... The decree
pleas to be false and found in favour of the plaintiff ... On the 25th
of that court was made on the 15th of April, 1908 ... made an application to
of May 1908 the plaintiff Sumat Prasad, ... the defendants to the suit for
the court for sanction to prosecute

1912

GUR CHARAN DAS v. HAR SARUP

1909, and notice was given to the public that the rules would be taken into consideration by the local Government on or after the 15th of May 1909 and in pursuance of that notice after considering all criticism the rules as already mentioned were published in the official Gazette of these provinces on the 30th of July 1910 which gave the power of hearing the petitions questioning the validity of an election to a competent court The publication, therefore, was a valid publication of the rules, and the rules published in the official Gazette of these provinces on the 30th of July, 1910 no doubt have the force of law

The second question is as to which court is a competent court within the meaning of rule 42, published on the 30th of July, 1910 We have no doubt that the expression competent court within the meaning of that rule means a Civil Court of competent jurisdiction with reference to the valuation given by the petitioner on his petition

The question of the validity of the election is purely a civil question and the words "District Magistrate have been intentionally replaced by the words 'competent court"

The result is that we dismiss the appeal with costs

Appeal dismissed

REVISIONAL CIVIL

Before Mr Justice Bane

IN THE MATTER OF THE PET ... Subordinate Judge therefore

Criminal Procedure Code sec ... n inquiry under section 476 and to pass an

section ... that section It is next urged that on the ground of

civil sid ... and in view of the delay which has taken place in

The word ... order, this Court ought to interfere I am of opinion

the successor ... *Bahadur v* ... ourt is unable to interfere with the order of the court

Whethe ... n accordance with the rulings of this Court the present

High Court ... Code ... n could only be preferred under section 115 of the Code of

One ... cedure The case does not come within the purview of that

others ... The Court had jurisdiction to make the order and com ... no illegality in passing it Whether the order was expedient or not is not a ground on which this Court can interfere under the provisions of the section mentioned above No doubt, action should be taken under section 476 as promptly as po ...

(1) (1910) I L R 37 Calc 61?

1911

In the matter of the petition of Nawab Singh.

But there were circumstances in this case which might have justified the delay. However I do not wish to give my opinion on that question inasmuch as, in my opinion, this Court cannot interfere in the matter. I would dismiss the application and make no order as to costs.

Application dismissed.

APPELLATE CIVIL

1912 March 11.

Before Mr. Justice [illegible] and Mr. Justice Tudball.

KHETPAL (Decree-holder) v. TIKAM SINGH (Judgment-debtor).*

Civil Procedure Code (1882), section 230—Execution of decree—Limitation—Application for transfer of decree—Subsequent application for execution not in continuation of application for transfer.

Held that an application for execution can in no sense of the words be regarded as an application in continuation of an application for transfer of a decree from one court to another. In order that an application may be a continuation of another application, it is necessary that the two applications be of the same nature and the application for transfer, being an application of an entirely different nature from an application for execution of a decree, does not save the operation of section 230 of the Code of Civil Procedure, 1882. *Baij Lal Singh* v. *Dori Sankar* (1) followed. *Ram Sahai* v. *Nanni* (2) dissented from.

The facts of this case were briefly as follows:—

One Khetpal obtained a decree against the respondent on the 19th of December, 1895 at Agra. On the 15th of December 1908 he applied for transfer of the decree for execution to Aligarh. On the 24th of February 1909 an order was made granting this application. On the 23rd of March, 1909 an application was made for execution at Aligarh. The judgement-debtor objected that it was barred by limitation as more than 12 years had elapsed since the passing of the decree. The court of first instance held that the present application was an application in continuation of the application for transfer which was within time and it dismissed the objection. The lower appellate court reversed that order on the ground that an application for transfer could not be said to be an actual demand for execution though it might be a step in aid of execution. The decree-holder appealed.

Munshi *Benode Behari* (with him Munshi *Gobind Prasad*) for the appellant submitted that the application was within time being merely in continuation of the application for transfer. He relied on *Ram Sahai* v. *Nanni* (2)

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* Second Appeal No. [illegible] of 1911 from a decree of A. Sabonadiere, District Judge of Aligarh, dated the 19th of May 1911 reversing a decree of Banke Behari Lal Subordinate Judge of Aligarh dated the 4th of January 1910.

(1) (1898) I. L. R. 20 All., 78.

(2) Weekly Notes, 1899, p. 137.

Babu *Sital Prasad Ghosh* for the respondent contended that the application was time barred He cited *Sundar Singh* v *Doru Shankar* (1)

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Benode Behari was heard in reply

KARAMAT HUSAIN and TUDBALL JJ —In this case the decree holder obtained a simple money decree against the judgement debtor on the 19th of December 1896 Various infructuous applications were made for execution of the decree and the decree holder, on the 15th of December 1908 applied for the transfer of the decree from the court at Agra to that at Aligarh The application was granted on the 24th of February, 1909 He, then, on the 23rd March 1909 applied to the court at Aligarh for execution The court came to the conclusion that the application dated the 23rd of March 1909 was barred by the 12 years rule of limitation The decree holder has preferred an appeal to this Court, and his learned vakil argue that the application in question is an application in continuation of the application for transfer dated the 15th of December 1908, and is thus not barred by limitation In support of this contention reliance is placed upon *Ram Sahai* v *Nanni* (2) It lays down in substance that an application for transfer is tantamount to an application for execution The learned vakil for the judgement-debtor relies upon *Sundar Singh* v *Doru Shankar* (1) in which a Bench of this Court was of opinion that an application for transfer was not an application for execution of a decree, though they rejected the application for revision on another ground We are of opinion that an application for execution can in no sense of the words be regarded as an application in continuation of an application for transfer of a decree from one court to another In order that an application may be a continuation of another application it is necessary that the two applications be of the same nature, and the application for transfer being an application of an entirely different nature from that for execution of a decree, we agree with the view taken by the learned Judges in *Sundar Singh* v *Doru Shankar* in preference to that expressed in *Ram Sahai* v *Nanni* We, therefore, dismiss the appeal with costs

Appeal dismissed

(1) (1897) I L R 20 All. 78 (2) Weekly Notes 1886, p 137

P C*
1914
January
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April 23

PRIVY COUNCIL

DHARAM KUNWAR (PLAINTIFF) v BALWANT SINGH (DEFENDANT)
[On appeal from the High Court at Allahabad]

Estoppel Estoppel by conduct—Hindu Law—Adoption by Hindu widow under authority of her husband—Subsequent suit to set aside adoption as invalid—Denial of any valid authority to adopt—Adoption on having on faith of representations by widow married performed shradh of adoptive father and incurred heavy liabilities in maintaining his change of status and privileges

In this case which was an appeal from the decision of the High Court in *Dharam Kunwar v Balwant Singh* I L R 30 All 549 their Lordships of the Judicial Committee while expressing their opinion that the question in the case might well be decided as one of fact on the appellant s own statements without recourse to the doctrine of estoppel did not differ from the view of the High Court as to the applicability of that doctrine The appellant they held had asserted her authority to adopt in the most solemn manner under her hand and seal and her conduct both before and after that assertion had been of a like unequivocal character She could not now be allowed to change her story without grave injustice ensuing to the respondent who had acted in reliance upon her deliberate and repeated representations The estoppel however their Lordships said must be taken as being purely personal and did not bind any one claiming by an independent title

Appeal from a decree (4th August 1908) of the High Court at Allahabad which affirmed a decree (26th February 1906) of the Subordinate Judge of Saharanpur dismissing the appellant s suit

The suit was brought to obtain a declaration that the plaintiff had no power to adopt the defendant (respondent) and that in fact she never did adopt him and that a document called a deed of adoption, was null and void The main question for determination in this appeal was whether the appellant was, or was not estopped from questioning the validity of the adoption and both the Courts below decided that question against the appellant

The facts of the case will be found sufficiently stated in the judgement of the High Court (*Sir John Stanley, C J*, and Mr *Justice Banerji*) which is reported in I L R, 30 All, 549

On this appeal —

Sir R Finlay, K C, and *Ross* for the appellant contended that the Courts in India had erred in holding that the appellant was estopped from questioning the validity of the adoption, and that even if the evidence of the respondent as to the adoption were true, it did not establish an adoption according to the requirements of

* *Present*—Lord SHAW Lord ROBSON Sir JOHN EDGE and Mr AMEER ALI

Hindu law Reference was made to the Evidence Act (I of 1872) section 115, *Sarat Chunder Dey* v *Gopal Chunder Laha* (1), *Parvatibayamma* v *Ramakrishna Rau* (2), *Rāvji Vinaya Rav Jaggannath Shankarsett* v *Lakshmibai* (3), which was distinguished, *Gurulingaswami* v *Ramalakshmamma* (4), *Durga* v *Kushalo* (5), *Oomrao Singh* v *Mehtab Koonwer* (6), *Sukhbasi Lal* v *Guman Singh* (7) which was distinguished, *Gopee Lall* v *Chundraolee Buhoojee* (8) [*De Gruyther, K C*, referred to *Suryanarayana* v *Venkataramana* (9), as to the authority of the appellant to adopt] *Tulshi Ram* v *Behari Lal* (10) [*De Gruyther, K C*, referred on the question of estoppel to *Sarat Chunder Dey* v *Gopal Chunder Laha* (11)] The respondent would not suffer materially in any way by the setting aside of the adoption, there was no evidence to show any prospective loss

De Gruyther, K C, and *B Dube*, for the respondents, were not called upon

1912, *April 23rd* —The judgement of their Lordships was delivered by Lord ROBSON —

The appellant is the widow of one Raja Raghubir Singh, and she sued the defendant in the Court of the Subordinate Judge of Saharanpur to obtain a declaration that she had not adopted him as a son to her deceased husband, and that if, in fact, any ceremony of adoption had been performed, it was invalid owing to the absence of authority on her part from her husband to make such adoption She further prayed that a document purporting to be a deed of adoption dated the 13th of January, 1899 should be declared void as being executed by her without such authority as aforesaid

The Subordinate Judge dismissed the suit with costs and the High Court of Allahabad confirmed his decree

(1) (1892) I L R 20 Calc 296 L R 19 I A 203

(2) (1894) I L R 18 Mad 145

(3) (1887) I L R, 11 Bom 381 (396)

(4) (1894) I L R 18 Mad 53

(5) Weekly Notes 1882 p 97

(6) (1868) 3 Agra 103 a

(7) (1879) I L R 2 All 366

(8) (1872) I R I A Sup Vol 131 11 B L R 391 19 W R P C 12

(9) (190) I L R 26 Mad 382 L R 33 I A, 145

(10) (1889) I L R 12 All 328 (338)

(11) (1892) I L R 20 Calc, 296 (313 314); L R 19 I A, 203 (219)

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DHARAM KUNWAR v. BALWANT SINGH.

Raja Raghubir Singh was the owner of the extensive Landhaura estate or raj in the district of Saharanpur in the United Provinces. He died on the 23rd of April 1868 at the age of 20 years, leaving the appellant, the Rani, his widow and sole heir. She was then only 14 years old, and *enceinte*. Raghubir Singh was a religious man and was desirous of leaving behind him a son who should perform his *shradh* ceremonies and transmit to future generations the name and prestige of the Raj. When during his last illness he became hopeless of recovery, recognising the possibility that the child about to be born to his wife might be a girl or might not survive he gave formal and emphatic directions to his wife in regard to the adoption of a son. The Rani herself has pledged her word as to the nature and scope of those directions on more than one public and important occasion. She did so particularly in the deed of the 13th of January, 1899, and in her defence to the action of one Baldeo Singh which will be hereafter referred to. In the deed, which she undoubtedly executed with full appreciation of its contents she says:—

He made this will to me by way of precaution. If (God forbid) you give birth to a daughter or if a son be born but die after his birth I strictly order you to adopt some boy to me so that he might perform my *shradh* ceremony and yours and perpetuate my name and after your death become the absolute owner and possessor of the whole of my estate. If (God forbid) the son who might be adopted under this authority should die in your life time you will have power to adopt another boy.

In her defence to Baldeo Singh's action she informed the Court that she had full oral authority from her husband, and that he had not limited her to one, two, three or four sons.

The Rani gave birth to a son on the 16th of December, 1868. He died on the 31st of August 1870 leaving the Rani owner of the Raj. In 1877 she adopted a boy named Tohfa Singh, declaring by deed that she did so in accordance with the will of her husband. Tohfa Singh died two years after and the Rani thereupon in 1883 adopted a boy named Ram Sarup, still purporting to act in accordance with her husband's will. Ram Sarup died in 1885 and in 1893 the Rani made arrangements with a view to adopting a third boy. She executed an agreement in 1893 with one Lada Singh whereby he agreed to give her his son "to comply with the will of her husband" but before the adoption was formally carried out this boy unfortunately died in 1896.

These successive deaths seriously impressed the mind of the Rani, and she consulted her priests as to how the evil spirits might best be propitiated and appeased. Acting on priestly advice she went on pilgrimages to Gaya and other places and after making religious sacrifices she proceeded to arrange for another adoption. On the 2nd June 1898, she entered into a written agreement with Ram Niwas the father of the respondent whereby he made over to her his two sons, Balwant Singh (respondent) aged 14 years, and Tungal Singh aged 12 years:—

> In order that she may adopt any one of them she pleases having regard to their capability and her choice. Now the sons of me the executant shall live under the protection and custody of the said Rani Sahiba subject to the fulfilment of the further conditions necessary for the validity of the adoption the enforcement of which depends upon a particular time which may be considered suitable according to the rules of astrology. I shall have no claim as to their protection and guardianship.

The Rani ultimately selected the respondent Balwant Singh, and preparations were made for his adoption on an imposing scale. The 13th of January, 1899 was appointed for the ceremony, and on that day a great entertainment was given by the Rani. The European and Indian officials of the district, together with hundreds of friends, relations and caste fellows, were present at the invitation of the Rani and were hospitably regaled by her. The religious ceremonies proper to an adoption were all carried out and the newly adopted son was conducted to the *gaddi*, or throne where he was formally installed.

The Rani next proceeded to bring about the marriage of the respondent, and that ceremony was celebrated at her expense and in a manner befitting his new rank. In fact the respondent was thenceforth treated as a member of the Rani's family and cut off altogether from the family of his natural father.

In the following year Baldeo Singh claiming as reversionary heir instituted a suit against the Rani and the respondent in which he sought to have it declared that he was entitled to the property on the death of the Rani and that the adoption of Balwant Singh was invalid. The Rani defended that suit and acting upon her instructions her pleader made the statement as to her authority before mentioned and she herself executed and filed a written statement alleging that she had in fact adopted the respondent and that the adoption was valid in every respect.

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Baldeo Singh failed in that suit on the ground that he was not a reversioner and had no *locus standi* to impeach the adoption in question, but the allegations of fact by the Rani in regard to the adoption are now very properly pressed against her

The adopted son and the Rani have since quarrelled and in this action she seeks to get rid of the adoption altogether

At one time she stated that the seal affixed to the deed of adoption was not her seal, but she did not attempt to support this allegation by production of the seal regularly used by her saying that she had mislaid it somewhere However documents admittedly executed by her and bearing seal impressions identical with that in dispute were produced and the genuineness of the seal on the deed of adoption was placed beyond doubt

The learned Subordinate Judge stated the issue or questions arising in the case as follows —

1 Whether the plaintiff had knowledge of the contents of the deed of adoption when she executed it and got it registered or whether she had no knowledge of them?

2 Was or was not the defendant adopted by the plaintiff?

3 Had or had not the plaintiff any authority from her husband to adopt the defendant?

4 If the first and second issues be decided against the plaintiff how will it affect the claim?

With regard to the first of these questions the Rani pleaded that she was a *parda nashin* lady and had never understood the contents of the document or had even known what it was, but the learned Subordinate Judge formed the opinion that the long examinations to which she had on different occasions been subjected and the extreme shrewdness which she displayed in dealing with the questions showed that she was an acute and intelligent lady and that her only difficulties arose from the impossibility of making her statements fit with undoubted facts The deed was executed by her under circumstances of the greatest publicity and with the assistance of competent and independent advice from many quarters It was attested by no less than 28 witnesses It was subsequently registered (on her own admission of execution) and was frequently and openly referred to by the Rani as a deed of adoption The Trial Judge therefore found that she executed the deed with full knowledge and understanding of its contents and the High Court agreed with him

The Rani next denies that the adoption was in fact carried out The great entertainment of the 15th January 1899 was according to her only an intimation to the public that she meant at some further time to carry the adoption into effect On this point except for the allegations of the Rani herself the only evidence worth considering was practically all one way and as to the Rani s testimony, the learned Judge says in plain terms that she had made so many untrue statements that it was impossible to believe her while the evidence produced on her behalf was utterly unreliable and untrue The High Court agree with this finding as to the justice of which there can be no doubt

The third question viz as to whether the Rani had authority from her husband to adopt the defendant gives rise to the point which has been argued before their Lordships The Rani contends that the authority conferred upon her by her husband did not extend according to its strict wording beyond the adoption of a second boy in case the first adopted son should die and that such authority was therefore exhausted by the adoption of Ram Sarup Their Lordships are of opinion that this was not the true effect of the authority in fact conferred upon the Rani She may not have remembered with precision the words used by her husband on his death bed but whatever the exact words may have been, undoubtedly the effect they then produced on her mind and on the minds of those about her was that which she set forth in her statement in Baldeo Singh s action viz that her husband had not limited the authority to make such adoption to one two three or four sons

That is the meaning on which she has consistently acted until her quarrel with the respondent, and the words ascribed to her husband according to her recollection in the deed of adoption have always until this litigation been regarded by her and her advisers as intended to express a general authority What the deceased Raja intended was that if necessary some boy should be adopted to him " so that he might perform my *shradh* ceremony and yours and perpetuate my name and after your death become the absolute owner and possessor of the whole of my estate, but in expressing this intention he saw that it might be defeated by death if construed in a restrictive sense as meaning some

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"one boy so he went on to deal with that contingency by directing in substance that effect was in any event to be given to the general intention and if one boy died another boy was to be adopted The Trial Judge did not expressly decide this question of fact He found as did the High Court that in the circumstances of this case the Rani was estopped from alleging want of authority

Their Lordships in reviewing the facts of the case, are of opinion that the question may well be decided as one of fact on the Rani s own statements without recourse to the doctrine of estoppel In their view she was speaking the truth in Baldeo Singh s action when she was pleading as to her authority Their Lordships, however do not differ from the Courts below in the they have taken as to the applicability of the doctrine of estoppel in this case Of course, the estoppel pleaded against the Rani must be taken as purely personal It does not bind any one who claims by an independent title but in view of the decision now given that the respondent was in fact, duly adopted further litigation on the point may be taken as happily out of the question So far as the Rani herself is concerned it would indeed be difficult to have a stronger case of estoppel She has asserted her authority in the most solemn manner under her hand and seal and her conduct both before and after that assertion has been of a like unequivocal character She could not now be allowed to change her story without grave injustice ensuing to those who have acted in reliance upon her deliberate and repeated representations The respondent is now severed from his natural family , he has undergone a change of social status which may or may not be beneficial to him but which has certainly so altered his mode of life as to make a relapse into his former condition a grievous hardship upon him He and his friends have been driven to expenses in the maintenance of the privileges with which the Rani purported to endow him He married on the faith of his adoptive mother s word and no doubt has creditors who have sold him goods or lent him money in like reliance on her good faith

Under these circumstances the Rani s argument that the doctrine of estoppel does not apply because the defendant could show no loss or detriment is without any substance whatever and she must be held to her word and to the results of her conduct

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed with costs

Appeal dismissed

Solicitors for the appellant —*T L Wilson & Co*

Solicitors for the respondent —*Barrow, Rogers and Nevill*

J V W

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DHARAM KUNWAR *v* BALWANT SINGH

BRIJ LAL AND ANOTHER (DECREE HOLDERS) *v* SURAJ BIKRAM SINGH (REPRESENTATIVE OF DEBI BAKHSH SINGH) (JUDGEMENT DEBTOR) *and another appeal consolidated*

P C
1912
May 2

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow]

Hindu Law—Will—Construction of will—Bequest to testator's daughter in law after death of wife—Whether it conferred an absolute or only a life estate in the property

The will of a Hindu testator after reciting that he had no male heir and had already provided for his widowed daughter stated — I have resolved that after my death my wife legatee No 1 shall remain in possession and enjoyment of all my property with all powers or authority like myself and that after the death of my wife my daughter in law widow of Raghuraj Singh legatee No 2 shall remain in possession and enjoyment of all the properties aforesaid like myself and legatee No 1 * * * * I therefore execute a will in favour of my daughter in law so that on the demise of myself and my wife the estate and name of my ancestors may continue as before and she in place of Raghuraj Singh shall perform my funeral ceremonies and those of my wife according to the *shastras* and the custom of the family and then she shall have power to nominate any one whom she may think fit as heir so that the name of the family may continue as formerly and now with honour

Held (affirming the decision of the Court of the Judicial Commissioner) that on the true construction of the will the word heir meant heir to the testator and the daughter in law took (as did the wife) not an absolute interest but only a life estate in the testator's property which was therefore on her death not liable to attachment and sale under decrees against her representative

Two consolidated appeals from the judgements and decrees (7th August, 1907) of the Court of the Judicial Commissioner of Oudh which reversed two decrees (12th February 1907) of the Subordinate Judge of tahsil Biswan in the district of Sitapur

The question for decision in these appeals was whether upon the true construction of the will of one Narpat Singh dated the 11th of July, 1893, an absolute or merely a life estate passed to Rani Brij Nath Kunwar (since deceased) in the village of Intgaon which had been attached in execution of decrees

**Present* —Lord MACNAGHTEN Lord ATKINSON Lord SHAW SIR JOHN EDGE and Mr AMEER ALI

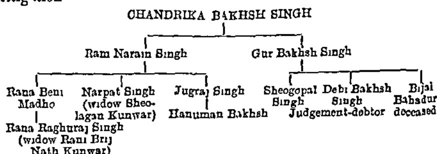
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The facts were that on the 26th of June, 1906, the present appellants obtained decrees for Rs 8,325-4-0 and Rs 4,599 with interest in two suits (4 and 5 of 1906) in the Court of the Subordinate Judge of tahsil Biswan against one Debi Bakhsh Singh as representing the said Rani Brij Nath Kunwar deceased, and the amounts of the decrees were to be realized from the assets of the said deceased. On the 25th of July, 1906 the appellants applied for execution of the decrees by attachment and sale of the village Intgaon as being an asset of the estate of the deceased then in possession of the respondent

On the 25th of August, 1906 Debi Bakhsh Singh filed objections to the attachment and sale, on the ground that the deceased had only been entitled to a Hindu widow's interest in the property, which terminated on her death, and to those objections the appellants filed a reply maintaining that the deceased had an absolute interest in the property under the will of the 11th of July, 1893

Narpat Singh died on the 2nd of February, 1894 The following pedigree shows the relationship between the parties to this litigation —



The testator in his will recited that he had no male heir, but a widowed daughter Bachchi Sahiba to whom he had given for "life maintenance" a village called Lilauli and that as she was unwilling to have possession of it, he had in lieu thereof executed and registered a deed of agreement for Rs 700 annually in her favour, and stated that as regards the remaining villages and other movable and immovable property "I have resolved that after my death my wife Sheolagan Kunwar, legatee No 1 shall remain in possession and enjoyment (*qabiz-o-mutsarrif rahe*) of all the property aforesaid with all powers (or authority) like myself (*mai jami ikhtiarat misl mere*) and that after the death of my wife, my daughter in law Rani Brij Nath Kunwar, widow of Rana Raghuraj

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Singh, legatee No 2 shall remain in possession and enjoyment (*qabiz o mutsarif dakhil rahe*) of all the property aforesaid like myself (*misl mere*) and legatee No 1

The testator then referred to other wills which he had made and subsequently revoked among them one in favour of Suraj Bikram Singh, son of Babu Debi Bakhsh Singh, and after giving his reasons (mainly the bad conduct of the boy) for cancelling that will he said — I therefore, *having cancelled the will* in favour of Suraj Bikram Singh again execute a will in favour of my daughter in law Rani Brij Nath Kunwar, and get it registered, having compelled her to consent to it so that on the demise of myself and my wife, the estate and name of my ancestors may continue as before and she in place of Raghuraj Singh shall perform my funeral ceremonies and those of my wife according to the *shashtras* and the custom of the family and then she shall have power to nominate any one whom she may think fit as 'heir so that the *name of the family may continue as formerly and now with honour* (*sath nek nami*)'

On the 12th of February, 1907, the Subordinate Judge held in the matter of the execution of the decrees that Rani Brij Nath Kunwar took an absolute interest in the property under the will of Narpat Singh and that the property was consequently liable to attachment and sale in execution of the decrees

From that decision Debi Bakhsh Singh appealed to the Court of the Judicial Commissioner in the more highly valued case, and to the District Judge of Sitapur in the other case and the latter was transferred for hearing to the Court of the Judicial Commissioner The appeal was heard by *Mr E Chamier* Judicial Commissioner, and *Mr J Sanders*, First Additional Judicial Commissioner, who held in separate judgements that Rani Brij Nath Kunwar took only a life interest in the property in dispute, and not an absolute estate and that it was therefore not liable to attachment and sale in execution of the decrees

MR CHAMIER in his judgement said —

Rani Brij Nath Kunwar was the widow of the testator s nephew not the widow of his son but the testator would according to the custom of his class call her his daughter in law The point is of no importance

It appears to me that the decree holders are on the horns of the dilemma The testator uses the same words to describe the estate conferred upon Brij Nath Kunwar as he does to describe the estate conferred upon Sheoligan Kunwar

[illegible]

[illegible]

I am constrained to observe that the word ... used with reference to Brij Nath Kunwar means no more than ... possession only.

"Counsel for the decree-holders laid stress upon the words ... *ikhtiyar* (with all power or authority). In the first place they are used with reference to Sheolagan Kunwar so that if they denote a transferable estate there was nothing left for Brij Nath Kunwar. Next, full effect can be given to these words without construing them as imparting a transferable estate, and lastly this must be read with the context. It is noticeable that the testator does not say that either of the ladies is the malik (proprietor). The whole will seems to work up to the nomination of an heir obviously a male heir by Brij Nath Kunwar who he assumed, would survive both Sheolagan Kunwar and himself.

"In my opinion there can be very little doubt that the testator did not intend to confer a heritable estate upon either of the ladies.

I would allow the appeal and dismiss the decree-holders' application with costs in both Courts.

MR. SANDERS said —

"Rani Brij Nath Kunwar held the property for less than 12 years and nominated no heir before she died.

The learned Subordinate Judge referred to former litigation between Babu Debi Bakhsh Singh and Bijai Bahadur Singh on the one hand and Musammat Brij Nath Kunwar and Suraj Bikram Singh on the other in which the construction of the will was in question and to the judgement of Mr. Spankie, Additional Judicial Commissioner, with which that litigation ended. The judgement is dated the 18th of January 1901 and it decides only the nature of the estate conferred on Musammat Sheolagan Kunwar. In it Mr. Spankie has considered the nature of the interest that Babu Narpat Singh's widow Sheolagan Kunwar took. The plaintiffs in that suit contended that the will conferred an absolute estate on the widow and that it contained no subsequent words indicating an intention on the testator's part to cut that estate down to a life interest. The defendants on the other hand contended that by the will an absolute estate was conferred

on both the widows Mr Spankie held that for the construction of a will the intention of the testator as found from the whole instrument is to be the guide that his intention as gathered from the will was that the widow should succeed and on her death Musammat Brij Nath Kunwar was to succeed that if the will could be construed so as to give effect to such an intention such a construction should be placed on it and he concluded that a widow's estate only was given to Sheolagan Kunwar and that there were no subsequent words evidencing the testator's intention to give a larger estate to her

The learned Subordinate Judge after discussing the terms of the will proceeded to hold that the similarity in the words of the will conveying an estate to each of the widows furnishes no reason why the same construction should be put on the words of both bequests that because the bequest to Sheolagan Kunwar was that of a limited estate the words conveying the estate to Brij Nath Kunwar should not be similarly construed that the document should be construed so as to meet the wishes of the person who made it that it is quite possible that a word (probably meaning a phrase) might have been used by him in two different senses and that in order to arrive at a conclusion that the words (or phrases) were so used it was necessary to look into all the circumstances He then went on to draw an inference from Mr Spankie's judgement that as the gift to Sheolagan Kunwar was followed by another to Brij Nath Kunwar the former was necessarily held to be a gift for life for otherwise the gift in favour of Brij Nath Kunwar could not be given effect to and he concluded that because there are no words limiting the latter gift to the term of her life only and because a power was conferred on her of nominating an heir therefore the gift to Brij Nath Kunwar was one of an absolute estate The Subordinate Judge considered that this conclusion was in conformity with the decision of their Lordships of the Privy Council in *Mahomed Shums ool Hooda* v *Shewukram* (1)

After referring to the cases cited on the construction of such documents as that under consideration, and referring to the principles laid down by their Lordships of the Privy Council in the above case as to the construction of wills the judgement continued

In order to ascertain the intention of the testator former wills cannot be looked at and in the light of the principles laid down in the Privy Council ruling *Mahomed Shums ool Hooda* v *Shewukram* (1) I hold that in the case of Narpat Singh it may be assumed that the testator a Hindu gentleman of advanced age had some knowledge of Hindu law That he was aware of the distinction between an estate for life and an absolute estate may be inferred from the words in the preamble that he made over the village Lilauli for life maintenance to his daughter

It was argued by the Hon'ble Rai Sri Ram Bahadur for the decree-holders that the absence of express words limiting the gift to a life estate in favour of Rani Brij Nath Kunwar indicated the testator's intention that her interest in the estate should be absolute I would draw a contrary inference It was held by the Additional Judicial Commissioner Mr Spankie that the testator's intention

(1) (1874) L. R. 2 I A., 7 14 B L R 226

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was to confer a limited esta e on Musammat Sheolagan Kunwar Rai Sri Ram Bahadur was at first disposed to dispute the correctness of this finding but he afterwards acknowledged it Inasmuch, therefore as the gift to Sheolagan Kunwar was for life only the intention of the testator must have been to confer a similar estate on Rani Brij Nath Kunwar

I cannot agree with the learned Subordinate Judge s opinion that the similarity of the words conferring the estate on the two ladies is no reason for the placing of the same construction on them On the contrary I think that it is a very good reason and that it was intended

' The only circumstances that he refers to are the absence of words limit ing the estate to Brij Nath Kunwar for life and the power given to her of nomin ating an heir But if it were the intention of the testator to confer an absolute estate on Rani Brij Nath Kunwar then the grant of the power to nominate an heir would have been superfluous I think that the grant of that power is an other indication of his intention to confer a limited estate In the will the testator has expressed his anxiety that the estate and the name of the family may continue to exist as heretofore It may be implied from these words that the testator wanted an heir from his own family to be nominated for he was aware that there were reversioners in it There are other circumstances which appear to me to help towards the conclusion that the testator s intention was to confer a limited estate on Brij Nath Kunwar in addition to his knowledge that women do not as a rule take absolute estates by inheritance

The will contains no indications that he had any extraordinary affection for Brij Nath Kunwar It says that she was childless and past the hope of bear ing children that she was already well provided for It does not show that he was at feud with his kinsmen while in two places it expresses his wish that the estate should remain as heretofore

My conclusion therefore as drawn from the whole tenor of the will and these circumstances is that the testator intended to confer the same estate on both the ladies that if he had wished to give an absolute estate to Brij Nath Kunwar he would have used express words indicating that intention and that the power he gave to her of nominating an heir do not indicate any such inten tion No inference as to such an intention can be drawn from the fact that Sheolagan Kunwar in her life-time made over the estate to Rani Brij Nath Kunwar

Pending the appeals to the Privy Council Suraj Bikram Singh was put on the record in place of his father Debi Bakhsh Singh deceased

Kenworthy Brown for the appellants, contended that on the true construction of the will, Rani Brij Nath Kunwar took an absolute estate and not a limited or life estate in the property, and that consequently the property was liable to attachment and sale in execution of the decrees of 26th June 1906 Reference was made to *Mahomed Shumsool Hooda* v *Shewukram* (1) and the principles

(1) (1874) L. R., 2 I A 7 14 B L R 226

there laid down by their Lordships of the Judicial Committee as to the construction of wills which it was submitted were applicable to the document now under consideration *Hoy v Master* (1) was also referred to

De Gruyther K C, and *Ross* for the respondent were not called upon

1912, *May 2nd* —The judgement of their Lordships was delivered by LORD MACNAGHTEN —

This is a very simple case The only question is whether the daughter took an absolute estate or an estate for life?

In the first place there is no estate at all given to the lady in terms The only direction is that she is to remain in possession and occupation of the property and then she is invested with the power of appointing an heir either in her life time or by will It seems to their Lordships that the word 'heir' in that clause means heir to the testator and that the judgement of the Judicial Commissioners is perfectly right

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be dismissed and with costs

Appeal dismissed

Solicitors for the appellants —*T L Wilson & Co*

Solicitors for the respondent —*Barrow, Rogers & Nevill*

J V W

(1) (1834) 6 Sim 568

1912
February 24

APPELLATE CIVIL

Before Mr Justice Karamat Husain and Mr Justice Tudball

AYESHA AND OTHERS (DEFENDANTS) *v* FAIYAZ HUSAIN (PLAINTIFF) AND MUSAMMAT KULSUM (DEFENDANT) *

Act No IX of 1908 (Indian Limitation Act) section 29—Act No XV of 1877 (Indian Limitation Act) section 2 schedule II, article 5—Suit for restitution of conjugal rights—Limitation

The plaintiff in a suit for restitution of conjugal rights filed in 1910 alleged that his wife had been taken away by two of the defendants under a promise that she should return to him shortly but subsequently they denied all knowledge of her whereabouts In 1909 he alleged he was informed that she was living at a certain place with one of the defendants

Held that the plaintiff's suit was not barred by limitation *Binda v Kaunsilia* (1) referred to

The facts of this case were as follows —

Faiyaz Husain the plaintiff brought a suit on the 5th of February 1910, for restitution of conjugal rights and an injunction against his wife his mother in law brother in law and one Chhidda Khan His allegations were that his wife whom he had married in 1906 after having lived with him for two months in Agra was taken away to Bulandshahr by her mother and brother in connection with a marriage ceremony in their family with a promise to send her back to her husband at Agra after two months, that this they failed to do that he went to Bulandshahr but could not get any information about his wife from the mother in law or the brother in law and that on subsequently coming to know that she was living with one Chhidda Khan he instituted the present suit, stating that the cause of action arose in 1906 when his mother in law and brother in law failed to send back his wife to him after the expiry of two months as promised by them. The defence was that the suit was barred by limitation under article 35 of the Limitation Act of 1877 and that the plaint did not disclose any cause of action against the present appellants Both courts decreed the plaintiff's suit

The defendants appealed

Babu *Balram Chandra Mukerji* for the appellants —

The sole point in this case is whether the suit was barred by article 35 of the Limitation Act of 1877 which provided a period

* Second Appeal No 5 0 of 1911 from a decree of H W Lyle District Judge of Agra dated the 13th of February 1911 confirming a decree of Sheo Prasad Subordinate Judge of Agra dated the 21st of June 1910

(1) (1890) I L. R., 13 All., 227

of two years for a suit for restitution of conjugal rights. In 1906, when the cause of action arose, the Act of 1877 was in force. Before the new Act of 1908 came into force, the right to bring such a suit was barred. The High Court in the case of *Bindu* v. *Kaunsilla* (1) were of opinion that that article could not apply on the ground that the Legislature could not by a side wind introduce the system of divorce into the Hindu law, but they failed to see that the extinction of the right to bring a suit did not necessarily amount to a complete dissolution of the marital tie. Moreover, in that case the parties were Hindus, and the observations of their Lordships as regards the applicability of the principles enunciated in that ruling to Muhammadans were merely *obiter dicta*. On the other hand it has been held by the other High Courts that article 34 and 35 of the Limitation Act applied both to Hindus and Muhammadans: *Bai Sari* v. *Sankla Hirachand* (2), *Fakirgauda* v. *Gangi* (3), *Dhanjibhoy Bomanji* v. *Hirabai* (4), *Azir-un-nessa Khatun* v. *Burhoo Meah* (5) and *Saravanai Perumal Pillai* v. *Pooviyi* (6).

1912

AYESHA v. FAIYAZ HUSAIN.

It does not matter for what reason the Legislature removed articles 34 and 35 from the new Act: as the cause of action arose under the old Act and was barred by the same Act, there can be no question that the right was gone. Moreover, the plaint as it stands does not disclose a cause of action against the defendants appellants. In the absence of any allegation to the effect that these defendants were preventing or withholding the wife from returning to her husband, the mere non-fulfilment of a promise to send back the wife did not surely give rise to the alleged cause of action.

Babu *Piari Lal Banerji* (for Munshi *Binode Behari*) for the respondents:—

The first point to be considered is which Limitation Act applies. The suit was filed in 1910, and therefore the Act of 1908 should apply. The present Act does not provide of limitation for suits for restitution of conjugal rights and therefore the suit is not barred under the new Act. Moreover, the present Act does not enact that any right to sue barred under the previous Act cannot be enforced

(1) (1890) I. L. R. 13 All. 126. (4) (1901) I. L. R. 25 Bom., [illegible]
(2) (1892) I. L. R. 16 Bom., 714. (5) (1907) I. L. R. 34 Calc., [illegible]
(3) (1898) I. L. R., 23 Bom., 807. (6) (1905) I. L. R., 28 Mad., [illegible]

1912

AYESHA v FAIYAZ HUSAIN

under the present Act In the Act of 1877, section 2 provided that no right to sue which had become barred under the previous Act could be enforced under that Act This proviso does not find place in the Act of 1908 and in the absence of such a provision it is quite clear that the law of limitation does not extinguish rights The law of prescription in India has been codified in section 29 of the Limitation Act and it only provides that the right to sue for possession of property would be extinguished after the period of limitation prescribed for its enforcement expired The law of limitation is not a law of prescription so far as other rights are concerned The right to enforce restitution of conjugal rights might have been *not enforceable* under the Act of 1877, but immediately the Act of 1908 was enacted the right became enforceable It was never extinguished The principle laid down in *Binda v Kaunsilia* (1) is good law and should be followed as it has received legislative recognition

Babu *Baldram Chandra Mukerji* in reply —

The present suit would not be governed by the Limitation Act of 1908 as the right came to an end before the Act came into force

KARAMAT HUSAIN and TUDBALL JJ —This was a suit by Faiyaz Husain against his wife her mother and brother and a fourth party for restitution of conjugal rights and for a perpetual injunction against defendants nos 2 3 and 4 restraining them from offering any interference as might prevent Musammat Kulsum, defendant No 1 from going to the plaintiff's house The substance of the plaint is that on the 7th of May 1906 defendants Nos 2 and 3 took away defendant No 1 from the plaintiff's house on the promise that they would send her back after the wedding of defendant No 3 that when she did not return he went to defendants Nos. 2 and 3 and made an inquiry but was told by them that they had no knowledge of her whereabouts that in November 1909 he learnt that defendant No 1 had contracted some connection with defendant No 4 and was at Hasanpur where he resides and that he (plaintiff) prosecuted him criminally under section 498 Indian Penal Code The defence set up by Chhiddu Khan was, that the plaintiff had divorced defendant No 1, and he had married her after the divorce and that no cause of action arose within the limits

(1) (1890) I L R 13 All, 126

of the jurisdiction of the court of first instance That court decreed the claim. That decree was affirmed by the lower appellate court In second appeal three points are taken (1) that there is no cause of action (2) that it did not arise within the jurisdiction of the court of first instance, and (3) that the suit is barred by limitation The facts disclosed by the plaint beyond doubt gave the plaintiff a cause of action. We agree with the lower court that at least a portion of the cause of action did arise within the jurisdiction of the court of first instance In view of the decision of this Court in *Binda v Kaunsilia* (1) and in view of the fact that articles 34 and 35 have been removed from the present Limitation Act, we are of opinion that the suit is not barred by limitation Moreover there is the fact that a right to restitution of conjugal rights is not one which is extinguished under section 28 of the Act of 1877 or of 1908 The result of the expiry of the period of limitation in respect of such a right under the Indian Limitation Act 1877, is that the remedy only is barred and the portion of section 2 of the same Act which enacts that "nothing herein or in that Act contained shall be deemed to affect any title acquired or *to revive any right to sue barred under that Act* or under any enactment thereby repealed, has not been reproduced in section 29 of the Limitation Act of 1908 The plaintiff's remedy under the present Limitation Act therefore subsists For these reasons we dismiss the appeal with costs

Appeal dismissed

(1) (1890) I L R 13 All 126

1912
March 11.

Before Mr Justice Karamat Husain and Mr Justice Tudball

KALLA AND OTHERS (PLAINTIFFS) v HARGIAN AND ANOTHER (DEFENDANTS)

Pre mortgage—Joint usufructuary mortgagee—Further simple mortgage on share of one mortgagor in favour of same mortgagee—What amount the claimants of the right to pre mortgage are liable to pay

Certain persons made a joint usufructuary mortgage of their property On the same day one of them executed a deed by way of a further charge or simple mortgage of his share in favour of the same mortgagee In a suit for pre-mortgage of the share of this second mortgagor it was *held* that the plaintiffs were not liable to pay the sum secured by the deed of further charge which was a separate and independent transaction but were entitled to pre mortgage upon paying such amount of the mortgage debt as was proportionate to the share of the said mortgagor

The facts of this case were briefly as follows —

On the 29th of January, 1909 Hargian Bhogi Ram, Pran Sukh and Kachera executed a usufructuary mortgage of certain zamindari shares in favour of one Manik for Rs 1,500 On the same day, Hargian executed a *mashrut ul rehan* bond in favour of the aforesaid Manik for a sum of Rs 99 The present suit was brought by the plaintiffs to pre empt Hargian's share in the usufructuary mortgage on payment of a proportionate amount of the mortgage money The mortgagee Manik contended in defending the suit that the plaintiff must pay a quarter of the mortgage money as the share of Hargian and must also redeem the *mashrut ul rehan* bond The court of first instance decreed the suit for pre emption on payment of the price demanded by the mortgagee The lower appellate court confirmed this decree, save as far as it related to costs The plaintiffs appealed

Pandit *Shiam Krishna Dar*, for the appellants —

The plaintiffs are only bound to pay a price proportionate to Hargian's share of the property mortgaged (4 bighas 18 biswas out of 26 bighas 5 biswas) They cannot be called on to pay a quarter share of the mortgage money The measure of payment must depend on the value of the share and not on the number of mortgagors The *mashrut ul rehan* bond is a separate transaction The plaintiffs are not bound to pre empt it All the incidents of a contract of mortgage do not apply in the case of a pre mortgagor a pre-emptor The only requisite condition in his case is the

*Second Appeal No 789 of 1911 from a decree of Muhammad Mubarak Husain Subordinate Judge of Agra dated the 13th of February 1911 confirming a decree of Shambhu Nath Dube Munsif of Agra dated the 14th of July 1910

payment of price. The doctrine of clogging also applies, and the bond is illegal being contemporaneous and not subsequent. He cited *Samuel* v. *Jarrah Timber and Wood Paving Corporation, Limited* (1).

The doctrine of clogging has been repeatedly applied in our courts. The one day rule is a very wholesome one though it is difficult to see what is exactly the reason underlying it. It was doubtless meant for the protection of debtors, otherwise why should not a deed of sale be executed in place of a deed of mortgage followed by a transfer of the equity of redemption. The deed is invalid, as it is contemporaneous. He cited *Sita Ram* v. *Nand Ram* (2).

Dr. *Tej Bahadur Sapru*, for the respondent:—

The nature of the suit is one for pre-emption. The pre-emptor must take the property on the terms taken by the vendee. This follows from the nature of his right which is a right of substitution. He referred to *Gobind Dayal* v. *Inayat-ullah* (3). Both the documents constitute one and the same transaction. There is nothing in law to prevent the creation of a simple as well as a usufructuary mortgage by the same deed. Therefore they can also be created by separate deeds at the same time. The mortgage contemplated a joint and several liability. In this case Hargian undertook all further liability and made himself responsible for both the debts. It is not the identity of instruments or that of parties which matters. There may be a covenant by one of the debtors as regards the whole liability, even though it may not affect all.

Pandit *Shiam Krishna Dar* was not called on to reply.

KARAMAT HUSAIN and TUDBALL, JJ.:—On the 29th of January, 1909, Hargian, Bhogi Ram, Paran Sukh and Kachera executed a mortgage with possession in favour of Manik to secure a sum of Rs. 1,500. The entire property mortgaged was 26 bighas 5 biswas. The share of Hargian in that was 4 bighas 18 biswas, that of Bhogi Ram, 1 bigha 12 biswas and the remaining 19 bighas 15 biswas belonged to Paran Sukh and Kachera. The mortgagors undertook a liability joint as well as several to pay the mortgage debt. On the same day Hargian executed a deed by way of *mashrut-ul-rehan* (a further charge) in favour of Manik in which he mortgaged his own share amounting to 4 bighas 18 biswas, for a sum of Rs. 99

(1) (1904) A. C. 323.
(2) Weekly Notes, 1881, p. 60.
(3) (1885) I. L. R., 7 All., 775 (799-803).

1912

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In this separate deed by way of *mashrut ul-rehan*, the stipulated that at the time of redeeming the mortgage executed jointly by him and three other persons, he would pay the money due under this separate deed. There is a recital in the mortgage deed that a sum of Rs 150 was due by Hargian to Kalla and others The plaintiffs then brought a suit for the pre mortgage of the share of Hargian under the mortgage deed dated the 29th of January 1909, executed by the four persons already mentioned The plaintiffs in their plaint alleged that the share of Hargian in the mortgage debt was only a sum of Rs 153 out of which the plaintiffs were according to the recital in the deed, entitled to a sum of Rs 150 and that therefore, they were entitled to pre mortgage on payment of Rs 3 The court of first instance decreed the claim, and the decree of that court was affirmed by the lower appellate court except as to costs That court directed that the plaintiffs, in order to succeed in their suit were bound to pay a sum of Rs 356 8 0 over and above the sum of Rs 150 which was due upon their own mortgage The plaintiffs have preferred a second appeal to this Court and it is contended by their learned vakil that the transaction by way of *mashrut ul rehan* being a separate and independent transaction, the plaintiffs are entitled to pre mortgage the prior transaction alone and that the mode adopted by the courts below of determining the amount which the plaintiffs are bound to pay under the mortgage is wrong Both these pleas in our opinion are well founded. We have no doubt that the mortgage of 29th January 1909, is a transaction quite separate from the transaction evidenced by the deed of *mashrut ul rehan* of the same date The mortgagors under the mortgage are four persons, and every one of them has undertaken a liability joint and several The mortgaged property is 26 bighas 5 biswas The mortgage is a mortgage with possession. In the deed of *mashrut ul rehan* Hargian only is the mortgagor The mortgaged property is his share only amounting to 4 bighas 18 biswas The consideration for the *mashrut ul rehan* is quite distinct from the consideration for the joint mortgage The mortgage under the *mashrut ul rehan* is strictly speaking a simple mortgage while the mortgage under the deed executed by Hargian and the three others, is a usufructuary mortgage That being so the plaintiffs in their suit for pre mortgage are not liable to pay the sum of Rs 99 secured by the *mashrut ul rehan* deed The share

of Hargian in the property mortgaged by him along with three other persons is 4 bighas 18 biswas and the entire sum of Rs. 1,500 is a charge upon the entire property amounting to 26 bighas 5 biswas. The charge on the share of Hargian is therefore in the proportion of the value of 4 bighas 18 biswas to the value of 26 bighas 5 biswas. We are supported in this view by the ruling of this Court in *Sita Ram* v. *Kunji Ram* (1). As the lower appellate court has not come to any finding regarding the value of the share of Hargian and the value of the entire property mortgaged on the 29th January, 1909, we refer the following issue to that court for a finding:—What are the proportionate values of the share of Hargian and of the entire mortgaged property? The court will be at liberty to take such additional evidence as the parties may adduce. Ten days will be allowed for objections on return of the finding.

1912 — KALL v. HARGI[AN]

Issues remitted.

Before Mr. Justice Sir Henry Griffin and Mr. Justice Chamier.

1912 *March* [...]

ALI BAKHSH AND OTHERS (DEFENDANTS) v. BARKAT ULLAH AND OTHERS (PLAINTIFFS).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 22—Succession—Special rule of succession exclusive of personal law of parties.

Held that the rule of succession which is laid down by section 22 of the Agra Tenancy Act, 1901, is independent and exclusive of the personal law of the parties to whom the section applies. Consequently the grandsons of a deceased occupancy tenant as his male lineal descendants would be entitled to share in the tenancy jointly with the sons of the late tenant. *Bhura* v. *Shahab-ud-din* (2) followed.

The facts of the case are as follows:—

One Chidda, a Muhammadan occupancy tenant, left four sons, the defendants appellants, and three grandsons by a pre-deceased son, the plaintiffs respondents. The revenue court entered on the basis of possession, the names of the defendants to the exclusion of the plaintiffs. Hence the plaintiffs sued for joint possession. The Munsif decreed the claim for joint possession over one-fifth of the holding. Both parties appealed. The District Judge practically upheld the decree of the Munsif, modifying it as regards the payment of costs. The defendants appealed.

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*Second Appeal No. 506 of 1911 from a decree of S. R. Daniels, First Additional Judge of Moradabad, dated the 14th of February, 1911, modifying a decree of Sarup Narain, Munsif of Sambhal, dated the 23rd of September, 1910.

(1) Weekly Notes, 1881, p. 80. (2) (1907) I. L. R., 30 All., 128.

1912

ALI BAKHSH v BARKAT ULLAH

The case came up for hearing before KNOX, J, who referred it to a Division Bench by the following order

"The question raised in this appeal appears to be *res integra* The only authority quoted to me is *Bhura* v *Shahab ud din* (1) I think it expedient that the case should be laid before a Bench of two Judges

Mr *A H C Hamilton*, for the appellants —

According to the personal law of the Muhammadans the plaintiffs would have got nothing It was never the intention of the Legislature to alter completely the Muhammadan law of succession by the enactment of section 22 of the Tenancy Act Although it does to a certain extent override the personal law, the courts should carry out the provisions of that section in a way so as to harmonize them with the personal law of the parties When among "the male lineal descendants" the sons are alive the sons of a pre deceased son can have no right whatever to the occupancy of the holding When the statute law has superseded the personal law of the parties the former is to be followed but where the statute is silent the personal law applicable to the parties should so far as possible be followed The operation of the section is to be considered as subject to the personal law of the parties so far as the latter is not inconsistent with the former The law of succession of the Hindus and Muhammadans has not been wholly abrogated by the provisions of section 22 In several cases decided by this Court the principle of the right of survivorship among joint tenants has been recognized It follows from this that the personal law of the parties is to be taken into consideration so far as it can consistently be done in interpreting clause (*a*) of section 22 of the Tenancy Act It is submitted that the "male lineal descendants" are to succeed first as provided by section 22 but that they are entitled to preference in the order of succession according to the personal law to which they are subject

Pandit *Mohan Lal Sandal*, for the respondents —

The main question in dispute is whether the plaintiffs took equally with the defendants in which case the plaintiffs share would be three sevenths of the holding and not one-fifth over which the lower courts have given a decree in favour of the plaintiffs

(1) (1907) I L R 30 All 1?8

The parties are entitled to share in the occupancy holding, *per capita* and not *per stirpes* Although this point was not pressed in the lower appellate court the respondents can raise this point here by filing cross objection, *Shankar Lal* v *Sarup Lal* (1) The personal law of the parties had nothing to do with the order of succession provided by section 22 of the Tenancy Act, and there is no warrant for holding that the nearer "male lineal descendant" would exclude the more remote, *Bhura* v *Shahab ud din* (2)

Mr *A H C Hamilton* was heard in reply

GRIFFIN and CHAMIER, JJ —One Chhidda, a Muhammadan, was an occupancy tenant of a holding He died, leaving four sons and three grandsons the sons of a deceased son The latter brought the suit out of which this appeal has risen claiming possession of a $\frac{1}{5}$th share of the occupancy holding The court of first instance gave the plaintiffs a decree for a $\frac{1}{5}$th share in the holding, *i e*, the extent of the share which their father would have been entitled to, if he had been alive on the death of Chhidda Both parties appealed to the lower appellate court The plaintiffs' appeal was dismissed The defendants' appeal was successful so far that the decree of the first court was modified and in lieu of a decree for possession a decree was given declaring the plaintiffs to be joint sharers in the holding to the extent of $\frac{1}{5}$th The defendant's appeal against the decree of the lower appellate court and the plaintiffs have filed cross objections We are asked in this appeal to read the personal law of the parties into section 22 of the Tenancy Act In our opinion the personal law of the parties has nothing to do with the rule of succession which is laid down by section 22 of the Tenancy Act It was so held by this court in *Bhura* v *Shahab ud din* (2) In that case the son of a Muhammadan occupancy tenant tried to oust the grandson of the last holder of the tenancy, and he was unsuccessful Under section 22, the tenancy devolved on the male lineal descendants of the last holder of the tenancy The plaintiffs are male lineal descendants of Chhidda and therefore entitled to share in the tenancy

The court of first instance held that the plaintiffs were entitled to a $\frac{1}{5}$th share only The plaintiffs' appeal to the lower appellate court was dismissed They have not appealed to this Court

(1) (1911) I L R 34 All 140 (2) (1907) I L R, 30 All 128

1912

ALI BAKHSH v. BARKAT ULLAH

Therefore the decision that they were entitled to a one fifth share only has become final

The cross objection of the plaintiffs that they were entitled to possession must be sustained There is nothing to prohibit the granting of a decree for joint possession We dismiss the appeal with costs We allow the objection so far that we restore the decree of the court of first instance The plaintiffs will obtain their costs of the objection

Appeal dismissed

REVISIONAL CIVIL

1912
March 19

Before Mr Justice Banerji

GREAT INDIAN PENINSULA RAILWAY (DEFENDANT) v SHAM MANOHAR AND ANOTHER (PLAINTIFFS) *

Act No IX of 1890 *(Indian Railways Act) sections* 80 75—*Suit for compensation for loss of through booked goods—Short delivery—Uninsured goods*

Held that where goods are booked for conveyance over more than one railway system the owner can only claim compensation for loss against a railway company other than the company with which they were booked if it is shown that the loss occurred on the system of the company sued

Held also that if goods the insurance of which is obligatory are packed uninsured with other goods the insurance of which is not obligatory no compensation is obtainable for the loss of either class of goods *Pandlik Udaji Jadhav* v *S M Railway Company* (1) followed

The facts of the case are as follows —

The plaintiff booked six packages containing various kinds of goods from the Etawah station on the East Indian Railway, to be delivered at Jhansi, a station on the Great Indian Peninsula Railway Out of the six packages three were not delivered at Jhansi The plaintiffs sued the East Indian, the Oudh and Rohilkhand and the Great Indian Peninsula Railways The claim against the Oudh and Rohilkhand Railway was withdrawn by the plaintiffs

The lower court dismissed the plaintiffs' claim against the East Indian Railway on the ground that no notice under section 77 of the Indian Railways Act was given to that Company but it decreed part of the claim against the Great Indian Peninsula Railway deducting from the claim the value of those articles which

* Civil Revision No 6 of 1912

(1) (1909) 11 Bom L R 827

under the second schedule of the Act ought to have been declared and insured and which one of the plaintiffs had admitted formed part of the contents of each of the three packages lost

1913

GREAT INDIAN PENINSULA RAILWAY v. SHAH MANOHAR.

The defendant company applied for revision

Pandit *Ladli Prasad Zutshi* for the applicants —

Section 80 of the Railways Act provides that a suit for compensation for loss of goods can be brought either against the railway administration to which the goods were booked or against the railway administration on whose railway the loss of the goods occurred. In the present case the goods were admittedly delivered to the East Indian Railway and there is nothing to show that the loss occurred on the Great Indian Peninsula Railway Therefore no decree could be passed against the applicants

Secondly the lower court was clearly wrong in not dismissing the whole claim against the applicants as the plaintiff had admitted that the contents of each of the three packages were composed partly of goods, which under schedule 2 of the Railways Act ought to have been declared and insured Because section 75 of that Act clearly exempts a railway company from the responsibility of loss of packages containing such articles It was not necessary that the package or parcel should have contained nothing but such excepted articles as were mentioned in the second schedule, *Pandhi Udaji Jadhav v S M Railway Company* (1), *Nanku Ram v The Indian Midland Railway Company* (2) *Chunni Lal v The Nizam's Guaranteed State Railway Company, Limited* (3)

Babu *Sital Prasad Ghose* for the opposite party —

The lower court had before it section 80 of the Railways Act, as it refers to it in the judgement In spite of this, it has held the applicants liable for the loss of the packages That being so, it must be taken that the court was satisfied that the loss occurred on that railway although it referred to nothing on the record in support of this A Small Cause Court Judge was not bound to record all the evidence As regards the other point, it was certainly not the intention of the Legislature in enacting section 75 of the Railways Act to free the railway company from any risk whatever if the packages consigned to its care by the merest chance contained any articles which ought to have been declared

(1) (1909) 11 Bom L R 897 (2) (1900) I L R, 22 All, 361

(3) (1907) I L R, 29 All, 248

1912

GREAT INDIAN PENINSULA RAILWAY v SHAM MANOHAR

and insured By neglecting to insure and declare such articles all that the plaintiffs were liable for was, that they could not claim the price of those articles It would be preposterous to hold that the plaintiffs forfeited all claims to the entire packages or parcels by reason of the mere fact that each of the three parcels contained in a very small quantity articles mentioned in schedule 2 of the Act and which, as such, ought to have been declared and insured

Pandit *Ladli Prasad Zutshi* was not called upon to reply

BANERJI J —This was a suit for damages for non delivery of three packages consigned by the plaintiff at the Etawah Railway Station for despatch to Jhansi On the 23rd of May 1910, the plaintiff booked six packages for despatch from Etawah station to Jhansi Three of these were delivered and the other three were not delivered In respect of the articles contained in the packages not delivered the present suit was brought The defendants to the suit were the East Indian Railway, The Oudh and Rohilkhand Railway and the Great Indian Peninsula Railway The suit was withdrawn against the Oudh and Rohilkhand Railway, it was dismissed against the East Indian Railway, but a part of the claim has been decreed against the Great Indian Peninsula Railway This application for revision has been filed on behalf of that railway The first contention of the applicants is that having regard to the provisions of section 80 of the Indian Railways Act (Act IX of 1890), the claim could not be decreed against this railway unless it was proved that the goods were lost on that railway This contention appears to be well founded Section 80 provides that a suit for compensation—among other things—for loss of goods booked through or over the railways of two or more railway administrations may be brought either against the railway administration to which the goods were delivered by the consignor or against the railway administration on whose railway the loss occurred. In the present case the goods were delivered by the plaintiff to the East Indian Railway Therefore in accordance with the provisions of that section the Great Indian Peninsula Railway would not be liable unless the loss occurred on that railway It was denied by that railway that the goods ever came to its possession The plaintiffs, therefore, were bound to prove that the goods came into the possession of the Great Indian Peninsula Railway and that the loss occurred on that railway No evidence was

1913

GREAT INDIAN PENINSULA RAILWAY v. SHAM MANOHAR

given on the point and the court below does not find that the loss occurred on that railway I fail to understand how in view of the provisions of section 80 to which the learned Small Cause Court Judge has referred, he could make a decree against the Great Indian Peninsula Railway without finding whether the loss had occurred on that railway On this ground alone the applicants are entitled to have the suit dismissed It is also urged, that in view of the provisions of section 75 of the same Act no compensation could be allowed, in respect of any of the articles contained in the lost packages, inasmuch as a part of the goods contained in those packages were articles which, under the second schedule to the Act ought to have been insured The court below has excluded from the claim the value of those articles only which contained gold and silver tissue and lace But the section clearly shows that the protection afforded by the section extends not only to the articles containing tissue and lace (which ought to have been insured) but also to all the other articles contained in the parcels in which the articles first mentioned were placed This was held by the Bombay High Court in *Pandlik Udaji Jadhav v S M Railway Company* (1) and is justified by the language of the section. The plaintiff in his deposition admitted that the three parcels not delivered to him contained the articles of which he gave details in the court below Therefore on both these grounds mentioned above, the suit ought to have been dismissed against the Great Indian Peninsula Railway I allow this application, set aside the decree of the court below and dismiss the claim as against the applicants with costs in both courts

Application allowed

(1) (1909) 11 Bom L R p 827

1912
March 20

APPELLATE CIVIL

Before Mr Justice Karamat Husain and Mr Justice Tudball

LALTA PRASAD AND ANOTHER (PLAINTIFFS) v RAM KARAN (DEFENDANT)

Civil Procedure Code (1908) order IX rules 8 and 9 section 151—Dismissal of suit for default—Restoration—Sufficient cause—Court's inherent power to restore

Order IX, rule 9 of the Code of Civil Procedure 1908 makes it compulsory on a court to set aside a dismissal under rule 8 where the plaintiff satisfies the court that there was sufficient cause for non appearance It however cannot take away the court's power to restore the case for any other valid reasons

The facts of this case were briefly as follows —

Lalta Prasad and another filed a suit against the defendant respondent under the Religious Endowment Act The District Judge examined one plaintiff at the first hearing and ordered Lalta Prasad to be present in person on a subsequent date to which he adjourned the suit He mentioned to the plaintiff's pleaders, Rai Debi Prasad and B Munna Lal that the case would be taken up at 12 o'clock on the day of hearing but none of the plaintiff's pleaders put in an appearance nor did the plaintiff Lalta Prasad himself The defendant was present It was said that the plaintiff's pleader, Rai Debi Prasad as well as the defendant's pleader Babu Vikramajit Singh were absent at a late municipal meeting The Judge waited for twenty minutes and then dismissed the suit under order IX rule 8, of the Code of Civil Procedure The plaintiff applied for restoration filing an affidavit that he was lying, on the day of hearing in the chamber of his pleader Babu Munna Lal with a bad leg waiting to be informed of his case having come up Babu Munna Lal also filed an affidavit to the effect that he had conceived the Judge to have fixed two o clock for this case and so had started another in the court of the Additional Subordinate Judge The Judge held that the plaintiff had another pleader besides Babu Munna Lal, and he could have been informed by any of his pleader's clerks within the twenty minutes the court was waiting He accordingly rejected the application The plaintiff appealed

Dr *Tej Bahadur Sapru*, for the appellant —

The case is one of misapprehension The plaintiff's negligence was due to the common and natural reluctance of parties to appear

* First Appeal No 123 of 1911 from an order of Austin Kendall District Judge of Cawnpore dated the 30th of May 1911

unrepresented in a court The affidavits filed disclose a sufficient cause for setting aside the order under order IX rule 8 The plaintiff should not be made to suffer too much for his own folly or for the abstention of his pleaders He cited *Somayya* v *Subbamma* (1) Restoration is obligatory on courts if sufficient cause is shown There is no negative proposition that such applications can be granted unless sufficient cause is shown

Dr *Satish Chandra Banerji* (with him Lala *Purushottam Das Tandan*) for the respondent —

The ruling in 26 Madras 599 has not been followed in this Court, *Lal a Prasad* v *Nand Kishore* (2) I submit there is no other rule which can help the appellant He has not made out sufficient cause for an interference The lower court exercised sufficient discretion in the matter The plaintiff cannot claim anything as a matter of right

Dr *Tej Bahadur Sapru* in reply, referred to the provisions of section 151 of the Code of Civil Procedure

KARAMAT HUSAIN and TUDBALL, JJ —This is an appeal from an order refusing to re instate a suit dismissed for default of appearance by the plaintiffs under order IX, rule 8 The suit is one in respect to a trust by certain trustees against a co trustee who is charged with the management of the property

The lower court rejected the application for rehearing on the ground that sufficient cause had not been shown The facts briefly are as follows The suit was partly heard One of the plaintiffs had been examined and the suit adjourned to enable the other plaintiff to appear for examination Two of the leading pleaders were appearing for them One of these gentlemen and also the pleader for the opposite party are members of the Municipal Board of Cawnpore and on the date fixed were late in attending court owing to a meeting of the Board The other pleader for the plaintiff represented this to the Court early in the day and the Judge consented to taking the case at 12 o clock The pleader, however, misunderstood what the Judge said and thought that the case would be taken up at 2 o clock He informed the plaintiffs accordingly and the same information was conveyed to their other pleader on his arrival As a result when the case was called at 12 o clock both pleaders were engaged in other cases

(1) (1903) I L R 26 Mad , 599. (2) (1899) I L R 22 Calc , 66

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LALTA PRASAD v. RAM KARAN

in other courts The case was called repeatedly and the court waited for 20 minutes One of the plaintiffs was waiting in his pleader's room *It is inconceivable that he did not hear the case* called Finally at 12 20 p m, when no one appeared the Court dismissed the suit under order IX rule 8

On their application for restoration the plaintiffs pleaded that *they had not heard the calling of the case and placed before the* court the misunderstanding into which their pleader had fallen As a matter of fact it is admitted that the calling was heard, but too late to enable the plaintiffs to appear in person They arrived just after the case had been dismissed

It is highly probable that, like most litigants in these provinces they were unwilling to enter the court without their pleaders both of whom were at that time unable to leave the cases in which *they* were engaged

The lower court has held that there was not sufficient cause for non appearance and has rejected the application for restoration In the course of his order the learned Judge made comments on the plaintiffs case so far as it had been placed before him

On appeal, we are asked to hold that there was sufficient cause While we think that it might be difficult to hold that there was sufficient cause in view of the fact that the case was actually called and repeatedly called for 20 minutes in the manner in *which cases are* called *in Mofussil courts both within the* court room and outside the court room so that persons in attendance in the court compound were sure to hear, we are of opinion that the case is one of those in which the court may exercise its inherent powers of passing orders necessary for the ends of justice. Nothing in the Code of Civil Procedure can limit or otherwise affect such powers under which in our opinion a court can restore such a case as this on grounds other than sufficient cause for non appearance Order IX rule 9 makes it compulsory on a court to *set aside a dismissal under order IX, rule 8* where the plaintiff satisfies the court that there was sufficient cause for non appearance It however, cannot take away the court's power to restore the case for any other valid reason

In the present case it was no doubt foolish of the appellants not to have gone into court and asked for more time to enable them to secure the attendance of their pleaders but at the same

time it is clear that they were pressing their suit and had attended court for that purpose, and the court might well have acceded to their request passing a suitable order as to costs

We therefore allow this appeal and set aside the order of dismissal of the suit, which the lower court will restore to its file and proceed to take up again at the point to which it had arrived when the order of dismissal was passed The appellants will, however, whatever the result of their suit, bear their own costs of the application under order IX, rule 9 and of this appeal In no case will these be recoverable from the respondent The costs of the latter in this matter will abide the result of the suit

Appeal allowed

Before Mr Justice Karamat Husain and Mr Justice Tudball

1912 *March*

RAGHUBAR RAI AND OTHERS (DEFENDANTS) v JAIJ RAJ AND ANOTHER (PLAINTIFFS) AND MUSAMMAT CHUNA (DEFENDANT) *

Contract—Covenant in sale deed to discharge a debt due to a third party—Suit for compensation for breach—Actual damage not necessary to support suit—Cause of action—Limitation—Act No XV of 1877 (Indian Limitation Act), schedule II article 116

On a sale of immovable property the vendees covenanted with the vendors to pay a certain sum of money on account of a mortgage debt due by the vendors They did not pay in accordance with the covenant and the mortgagee thereupon brought a suit upon his mortgage and obtained a decree

Held on suit by the vendors for compensation for breach of the covenant that it was not necessary that the vendors should have suffered any loss before they could bring their suit and that as no time was specified in the sale-deed for the payment of the mortgage money limitation began to run from the date of the execution of the deed *Lethbridge* v *Mytton* (1) *Carr* v *Roberts* (2) *Loosemore* v *Radford* (3) *Ashdown* v *Ingamells* (4) *Dorasinga Tevar* v *Arunachalam Chetti* (5) *Raghunath Rai* v *Brijmohan Singh* (6) *Kumar Nath Bhuttacharjee* v *Nobo Kumar Bhuttacharjee* (7) and *Battley* v *Faulkner* (8) referred to.

The facts of this case were as follows —

On the 20th of April 1895, the plaintiffs sold certain landed property to some of the defendants and left a sum of Rs 708 with

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* Second Appeal No 414 of 1911 from a decree of L R Neave Additional Judge of Gorakhpur dated the 9th of February 1911 reversing a decree of Gokal Prasad Subordinate Judge of Gorakhpur dated the 22nd of August 1910

(1) (1831) 2 B & Ad 772
(2) (1833) 5 B & Ad., 78
(3) (1842) 9 M & W 657
(4) (1880) L R 5 Exch D 280
(5) (1899) I L R 23 Mad 441
(6) Weekly Notes 1901 p 14
(7) (1898) I L R 26 Calc 241.
(8) (1820) 3 Barn & Ald 288 22 R R 390

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in other courts The case was called repeatedly and the court waited for 20 minutes One of the plaintiffs was waiting in his pleader's room It is inconceivable that he did not hear the case called Finally at 12 20 p m when no one appeared the Court dismissed the suit under order IX rule 8

On their application for restoration the plaintiffs pleaded that they had not heard the calling of the case and placed before the court the misunderstanding into which their pleader had fallen. As a matter of fact it is admitted that the calling was heard, but too late, to enable the plaintiffs to appear in person They arrived just after the case had been dismissed

It is highly probable that, like most litigants in these provinces they were unwilling to enter the court without their pleaders both of whom were at that time unable to leave the cases in which they were engaged

The lower court has held that there was not sufficient cause for non appearance and has rejected the application for restoration In the course of his order the learned Judge made comments on the plaintiffs case so far as it had been placed before him

On appeal we are asked to hold that there was sufficient cause While we think that it might be difficult to hold that there was sufficient cause in view of the fact that the case was actually called and repeatedly called for 20 minutes in the manner in which cases are called in Mofussil courts both within the court room and outside the court room, so that persons in attendance in the court compound were sure to hear we are of opinion that the case is one of those in which the court may exercise its inherent powers of passing orders necessary for the ends of justice Nothing in the Code of Civil Procedure can limit or otherwise affect such powers under which in our opinion, a court can restore such a case as this on grounds other than sufficient cause for non appearance Order IX, rule 9 makes it compulsory on a court to set aside a dismissal under order IX rule 8 where the plaintiff satisfies the court that there was sufficient cause for non appearance It however cannot take away the court's power to restore the case for any other valid reason

In the present case, it was no doubt foolish of the appellants not to have gone into court and asked for more time to enable them to secure the attendance of their pleaders but at the same

1912 — Lalta Prasad v. Ram Laran

time it is clear that they wer pre ing their s it and had attend ed court for that purpose, and the cour migh well have ... to their reque t passing a suitable ord r as to cos

We therefore allow this appeal and se aside the order of dismissal of the suit whi h the lower court will res ore to its file and proceed to take up again at the point to whi h it had arrived when the order of dismissal was passed The appellants will however, whatever the result of their suit bear their own costs of the application under order IX rule 9 and of this appeal In no case will these be recoverable from the respondent The costs of the latter in this matter will abide the re ult of the suit

Appeal allowed

1912 March 21

Before Mr Justice Karamat Husain and Mr Justice Tudball

RAGHUBAR RAI AND OTHERS (DEFENDANTS) v JAIJ RAI AND ANOTHER (PLAINTIFFS) AND MUSAMMAT CHUNA (DEFENDANT)

Contract—Covenant in sale-deed to discharge a debt due to a third party—Suit for compensation for breach—Actual damage not necessary to support suit—Cause of action—Limitation—Act No XV of 1877 (Indian Limitation Act) schedule II article 116

On a sale of immovable property the vendees covenanted with the vendors to pay a certain sum of money on account of a mortgage debt due by the vendors They did not pay in accordance with the covenant and the mortgagee thereupon brought a suit upon his mortgage and obtained a decree

Held on suit by the vendors for compensation for breach of the covenant that it was not neces ary that the vendors should have suffered any loss before they could bring their suit and that as no time was specified in the sale-deed for the payment of the mortgage money limitation began to run from the date of the execution of the deed *Lethbridge* v *Mytton* (1) *Carr* v *Roberts* (2) *Loosemore* v *Radford* (3) *Ashdown* v *Ingamells* (4) *Dorasinga Tevar* v *Arunachalam Chetti* (5) *Raghunath Rai* v *Brijmohan Singh* (6) *Kumar Nath Bhuttacharjee* v *Nobo Kumar Bhuttacharjee* (7) and *Battley* v *Faulkner* (8) referred to.

The facts of this case were as follows —

On the 20th of April 1895, the plaintiffs sold cer... property to some of the defendants and left a sum ... only in which ... as payment of ... breach which, in ... contracts obliging ... of action during

Second Appeal No 414 of 1911 from a decree of L...h ... Judge of Gorakhpur dated the 9th of February 1911 ... Gokal Prasad Subordinate Judge of Gorakhpur dated t...

(1) (1831) 2 B & Ad 772
(2) (1833) 5 B & Ad 78
(3) (1842) 9 M & W 657
(4) (1880) L R 5 Exch D 280
(5) (1899) I L ...
(6) Weekly N ... R 5 Ex D 280
(7) (1898) I L R 3 ... 441
(8) (1820) 3 ... Notes 1901 p 14

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RAGHUBAR RAI v JAIT RAI

the continuance of the contractual relation (Mitra on Limitation, Vol I, p 304 7th Ed) Hence it was held in *Mansab Ali Gulab Chand* (1) that upon failure to pay the principal and interest secured by a bond upon the day appointed for such payment breach of the contract to pay is committed, and there is no 'continuing breach within the meaning of section 23 nor "successive breaches' within the meaning of Article 115 of the Limitation Act (Act XV of 1877)

The breach in the case before us occurred on the 20th of April 1895, and the action for compensation was brought on the 6th of June, 1910 and it was, therefore barred by six years' limitation under Article 116 of the Limitation Act There is no substance in the suggestion that the obtainment of the decree of the 14th of January, 1910, gives the plaintiffs a fresh starting point of limitation. The law of limitation has prescribed certain modes which give a fresh starting point of limitation and the obtainment of a decree is not one of those

In *Kumar Nath Bhuttacharjee* v *Nobo Kumar Bhuttacharjee*, (2) which was regarded as a suit for compensation for the breach of a covenant and which was defended on the plea of limitation a Bench of the Calcutta High Court, after discussing the cases of *Loosemore* v *Radford* (3) and *Lethbridge* v *Mytton* (4) remarked — These cases therefore, show that in a certain class of cases, even before an injury is done or damage takes place, the plaintiff may bring an action in order that the person making the covenant may place him in a position to meet the liability he has taken on the latter s behalf No authority has been shown to the effect that such a suit may not be brought for damages subsequent to injury sustained The causes of action in the two classes of cases are different In the one there is a right to bring an action to have the plaintiff put in a position to meet the liability cast upon him in the latter to be indemnified after the plaintiff has met the liability We think therefore that the plaintiffs were not bound to bring their action within six years from the date of the mortgage, that their cause of action arose when they were damnified, that is, when they paid the mortgage debt to Srinath Roy in 1893

(1) (1887) I L. R., 10 All. 85 (92.) (3) (1842) 9 M & W., 657
(2) (1898) I L. R., 26 Calc 241 (4) (1831) 2 B & Ad., 772.

With great respect to the learned Judges the rule laid down by them cannot be defended on principle. One breach of a contract can only furnish one cause of action and no more. Actual loss when it occurs is only one of the results of the breach and is not an act of the party who breaks a contract and can therefore create no second cause of action. It is a pity that the case of *Battley v. Faulkner* (1) was not brought to the notice of the learned Judges. That case is a clear authority for the proposition that consequential damage arising from the breach gives no new cause of action. The claim in that case was for compensation for a breach of contract brought within six years from the date on which damages occurred but beyond six years from the breach. The suit was held to be barred by time. BAYLEY, J. said:— "If the plaintiff in this case had released the defendant from the breaches of contract, that release would have been a bar to the present action for the special damages subsequently occurring and this shows that the foundation of the action is the breach of contract. It was, therefore from the period when the contract was broken that the cause of action accrued and as that happened more than six years before the commencement of the present action I think the nonsuit was right." HOLROYD, J., said:— "It is said, however, that although the action might be maintained upon the breach of promise, yet the damage sustained forms a substantive ground of action, but cannot be so considered in this form of action."

The point, that the date on which actual damage was sustained gave the plaintiffs a second cause of action, does not arise inasmuch as the plaintiffs have not yet paid any money to the heirs of Sanchi Ram.

To sum up. The suit is one for compensation for the breach of contract. The breach took place on the 20th of April 1895, and a cause of action arose on that day. The suit is, therefore, barred by limitation under Article 116 of the Limitation Act.

The point that a second cause of action will arise when the plaintiffs will sustain actual loss, is not before us.

The result is that we allow the appeal, set aside the decree of the lower appellate court and dismiss the plaintiffs' suit with costs.

Appeal allowed.

(1) (1820) 3 Barn. & Ald. 288: 22 R. R., 390.

1912
March 22

Before Sir Henry Richards Knight Chief Justice and Mr Justice Tudball

MAWASI (PLAINTIFF) v MUL CHAND AND OTHERS (DEFENDANTS) *

Pre emption—Custom—Wajib ul arz—Owner of isolated revenue free plots—Evidence of custom

The pre emptive clause of a wajib ul arz contained the following provision — If the owner of a share wish to sell it he shall do so first to his near relation who may be a co-sharer in the zamindari and in case of his refusal to anyone he likes

Held that this by itself was not sufficient evidence of a custom giving owners of isolated revenue free plots of land in the village a right to pre-empt

This was a suit for pre emption based upon an alleged custom, which was thus described in the wajib ul arz of the mahal concerned — If the owner of a share wish to sell it he shall do so, first, to his near relation who may be a co-sharer in the zamindari, and in case of his refusal to anyone he likes' The plaintiff was the owner of two revenue free plots of land in the mahal, and it was held by the court of first instance that this qualification was not sufficient to give him a right to pre-empt within the meaning of the wajib ul arz The court accordingly dismissed the suit The plaintiff appealed to the High Court

The Hon ble Dr *Sundar Lal* and Dr *Satish Chandra Banerji* for the appellant —

Babu *Jogindro Nath Chaudhri* and Pandit *Baldeo Ram Dave*, for the respondents —

RICHARDS C J and TUDBALL J —This appeal arises out of a suit for pre-emption. The plaintiff is the owner of two small plots of land which are not assessed for Government revenue The plots held by the plaintiff appear in the same *khewat* as the land which goes to make up a 20 biswas mahal To this extent and no further can it be said that the plaintiff is a proprietor in in the mahal in which the property sold is situate The 20 bighas 3 biswas and 7 biswansis do not go to make up the 20 biswas share set forth in the *khewat* The only evidence adduced by the plaintiff in support of the existence of a custom of pre-emption is the wajib ul arz. The wajib ul arz for mahal Chhidu is as follows —" In this mahal if the owner of a share wish to sell it, he shall do so first to his near relation who may be a co-sharer in the zamindari and in case of his refusal to anyone he likes '

* First Appeal No 365 of 1910 from a decree of Kalka Singh Additional Subordinate Judge of Agra dated the 9th of August 1910

The wajib ul arz for mahal Roti Ram is in similar terms Now the custom which the plaintiff attempts to set up is a custom giving a right of pre-emption to a person who is only a co sharer in the very limited sense which we have already stated namely he merely holds two revenue free plots entered in the same *Thewat* as the property which is sold is situated The probability of such a custom existing is very slight In the Full Bench case of *Dalganjan Singh* v *Kalka Singh* (1), the learned Chief Justice said — "The most essential feature of the co-parcenary body is the joint and several responsibility of the co-sharers for the payment of the Government revenue assessed on the mahal, coupled *in cases of zamindari tenure* with the holding and management of the whole of the lands of the mahal by all the co sharers in common. It is for the mahal for the "local area held under a separate engagement for the payment of the land revenue" not for a village or other local area, not being a mahal, that the Settlement Officer frames the wajib ul arz It is meant as a record of the contracts or the customs of the co sharers of the mahal This being its object, it is *primâ facie* unlikely to include any contract or custom which is absolutely *independent of* the continuance of the mahal as a fiscal and proprietary unit, or of *the co-parcenary body for which it is framed* It seems to us that in considering the question of the existence or non existence of a custom of pre-emption the principle involved in the foregoing remarks fully apply to the present case The plaintiff is in no way liable for the payment of Government revenue in conjunction with the vendor He has no right to have any voice in the management of the mahal in which the vendor's property is situate In all probability he would not be consulted or have any right to be heard when the wajib ul arz was being framed. It is in all probability a mere accident that the plots of land which he holds came to be put into the *Thewat* in which they are found There is in short no community of interest These are all matters which the court in considering the question of the existence or non existence of a custom of pre-emption is entitled and bound to take into consideration The wajib ul arz is not the custom It is merely a piece of evidence to be given due consideration to in the course of the inquiry The question is, whether by

(1) (1899) I. L. R. 22 All. 1

1912

MAWASI v MUL CHAND

production of the wajib ul arz in question, without the support of a single instance in which the right has been claimed or exercised, the plaintiff has discharged the onus of proving the existence of a custom of pre emption giving him as a proprietor of an isolated plot a right to pre empt

In our opinion the evidence falls altogether short of anything of the kind and the decision of the court below was quite correct We accordingly dismiss the appeal with costs

Appeal dismissed

1912 March 26

Before Mr Justice Sir George Knox and Mr Justice Sir Henry Griffin

GHULAM NASIR UD DIN AND ANOTHER (JUDGEMENT DEBTOR) v HARDEO PRASAD (PURCHASERS OF THE DECREE) *

Act No XV of 1877 (Indian Limitation Act) schedule II article 178—Act No IX of 9108 (Indian Limitation Act) section 15—Execution of decree—Limitation—Execution stayed by injunction

In execution of a decree certain property was attached by the decree holder by means of an application made on the 8th of July 1904 Objection was taken to the attachment which was disallowed on the 10th of March 1908 This was followed up on the 5th of April 1905 by a declaratory suit against the decree-holder An injunction was also granted on the 6th of April 1905 whereby the sale of the property in suit was stayed The suit terminated on the 26th of June 1907 but the injunction lasted until January 1909 The next application for execution was made on the 14th of April 1910

Held that this last application was within time whether the Limitation Act of 1877 or that of 1908 applied It was not relevant that the decree-holder might possibly have obtained execution of the decree against other property of his judgement debtor *Behari Lal Misir* v *Jagannath Prasad* (1) followed

The facts of this case were as follows —

The North Western Bank, Limited, of Meerut, obtained a decree against the appellants and others on the 24th of December 1897 This was confirmed in appeal by the High Court on the 7th of February, 1900

On the 8th of July 1904 the decree holders made an application for execution against the judgement debtors in the court of the Subordinate Judge at Delhi and attached certain property Two persons Hafiz Khairati and Hafiz Ahmad Husain objected to the attachment under order XXI rule 58 (old section 278) of the Code of Civil Procedure but their objections were disallowed.

* First Appeal No 179 of 1911 from a decree of Seti Raghubans Lal, Subordinate Judge of Meerut dated the 20th of January 1911

(1) (1906) I L R, 28 All, 651

They then brought a declaratory suit against the Bank on the 5th of April 1905, and on the next day obtained an injunction restraining the decree holders from proceeding further against the property On the 29th of June, 1907 this suit was decided in favour of the plaintiffs, and the decree was confirmed in appeal by the Punjab Chief Court on the 26th of January 1909 On the 19th of July 1907 the Bank made an application that the case be shelved for the time being as the property attached had been released stating that it would try and find out other properties which could be attached Proceedings were shelved accordingly

1912

GHULAM NASIR UD DIN v. HARDEO PRASAD

On the 13th of April, 1910 the decree holders made the present application for execution Nasir ud din objected that it was barred by limitation as more than three years had elapsed since the date of the last application of the 8th of July, 1904 He also contended that in any case as against him the present application was filed more than twelve years after the sale of the decree the final decree in the case being, as regards himself, the decree of the 24th of December, 1897

The court of first instance held that the application was not time barred inasmuch as the application of 1904 was pending all the time its execution was stayed by the order of injunction i e till the date of the decree, the 29th of June 1907 from which date the present application was within time As regards the second point, it held that limitation was saved by the fact that a warrant of arrest was issued against Nasir ud din in 1898, but as he avoided arrest his avoidance amounted to fraud The judgement-debtors appealed.

Maulvi *Muhammad Rahmat ullah* (with him Maulvi *Ghulam Mujtaba*), for the appellants —

Where execution has been stayed on account of any obstacle, the application cannot be revived unless and until such obstruction is decided in favour of the decree holder, *Thakur Prasad* v *Abdul Hasan* (1), *Suppa Reddiar* v *Avudai Ammal* (2) The latter case cites all the rulings on the point, and follows all the other High Courts The application of 1904 cannot be said, therefore, to have continued down to 1907 Section 15 of the new Limitation Act, IX of 1908 cannot benefit the decree holder The new Act came into force on the 1st of January, 1909, when

(1) (1900) I L R. 23 All 13 (2) (1904) I L R, 28 Mad 60 (62)

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GHULAM NASIR-UD-DIN v HARDEO PRASAD

the decree was already time barred Section 15 of the old Act applied only to suits and not to execution applications Retrospective effect also cannot be given to the now amended section unless expressly provided The final decree in the case as against Nasir ud-din was that of the 24th of December 1897 The present application is, therefore, barred by the twelve years rule contained in section 48 of the Code of Civil Procedure, *Ganga Kuar* v *Kesar Kuar* (1), *Mashiat un nissa* v *Rani* (2) No evidence has been produced to prove any such fraud or force as is required by section 48 clause 2 (1) of the Code of Civil Procedure The application for arrest was made on the 4th of March 1898 That was not within twelve years immediately before the date of the present application Again a subsequent application was made in 1904 after the application for arrest That shows there was no fraud The present application cannot be said to revive the application of 1904 It seeks different reliefs is filed in a different court, and concerns different properties He also referred to *Beni Prasad* v *Kashi Nath* (3) and *Rahim Ali Khan* v *Phul Chand* (4)

He cited *Shriram Chintaman* v *Sundarabai* (5) also *Raghunandun Pershad* v *Bhugoo Lall* (6)

The Hon ble Dr *Sundar Lal* for the respondents —

We applied for execution on the 8th of July 1904 An injunction was issued staying execution on the 6th of April, 1905 An application was, therefore kept pending till the suit in which the injunction was granted was decided which was on the 29th of June, 1907, or rather when the decree was finally confirmed on appeal on the 19th of July, 1909 The present application is within three years from both these dates The ruling in *Basant Lal* v *Batul Bibi* (7) is exactly in point

The decree holder might have proceeded against other property of the judgement-debtors but the whole question is whether he was bound to do so He had attached sufficient property to cover his claim, and he was not compelled to give it up and seek something else merely because somebody had put up a claim concerning it The case in 6 All is exactly parallel It

(1) (1904) 1 A L J 409

(2) (1889) I L R 13 All 1

(3) (1900) 6 A L J 401

(4) (1896) I L R 18 All, 482

(5) (1894) I L R, 20 Bom 175 (178)

(6) (1889) I L R 17 Calc 268

(7) (1883) I L R, 6 All 23

is not stated expressly in the report whether the matter there was decided in favour of the decree holder, but it must have been so as otherwise he would have applied for execution of the same property An inspection of the record of that case shows that the property attached was also released there by a suit The decree-holder there could have also gone against other property had he chosen The ruling in 6 All follows an earlier case, which is also in my favour, *Paras Ram* v *Gardner* (1) It has been repeatedly held that where execution proceedings cannot be continued on stay or other order obtained by some party, article 178 of the old Limitation Act applies The application is therefore within time It is not barred by the twelve years rule of section 48 Civil Procedure Code as against Nasir ud din The latter was a party to a cross appeal filed in the High Court in 1898 The final decree in the case was that of the 7th of February, 1900 It confirmed the decree as against Nasir ud din and awarded some further sums as against two other defendants

Maulvi *Muhammad Rahmat ullah*, in reply —

The ruling in 6 All is not contrary to that in 23 All, 13 Again this question was not considered in 6 All A revival of execution proceedings cannot be said to be the same thing as the revival of an application on execution

KNOX and GRIFFIN, JJ —The North Western Bank Company, Limited obtained a decree against four persons—Hamza Ali Khan, Khwaja Ghulam Nasir ud din Khan Musammat Aghai Begam and Mogal Jan judgement debtors on the 24th of December 1897 Hamza Ali Khan died and Faiz ud din Aftab Ali and the three remaining original debtors have been put on the record as his heirs An appeal was filed to this Court and that appeal was decided on the 7th of February 1900 The decree passed by the Subordinate Judge of Meerut was to a certain extent modified. Execution appears to have been first taken out on the 15th of January 1898 Several other applications in execution followed One of these was an application for execution made in the court of the District Judge of Delhi on the 8th of July 1904 This application was made within time and as a result some property situated in Delhi was attached as the property of Aghai Begam judgement debtor Upon attachment two persons Hafiz Khairati and Hafiz

(1) (1877) I L R 1 All 355

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Ahmad Husain, objected. The objection filed by them was rejected on the 10th of March, 1905 They followed up the objection by a declaratory suit against the Bank decree holder They also applied for an injunction. This was granted by the District Judge of Delhi, and under this injunction the sale of the property in suit was stayed until the decision of the suit On the 29th of June, 1907, the Delhi court gave its decision in the declaratory suit and on the 9th of July 1907, the pleader for the Bank, decree-holder, put in an application in this Court stating that as the attached property has now been released the Bank will find out new property and then apply for execution and meanwhile the case might be shelved and an order was passed sending it to the record room. On the 14th of April, 1910 Hardeo Prasad, who had in the interim purchased the decree from the Bank and had got his name entered on the record as decree holder instituted proceedings for attachment and sale of certain movable and immovable property said to belong to the judgement debtors Khwaja Ghulam Nasir ud din Khan and Musammat Aghai Begam, judgement debtors took objections They urged, that as no application had been made by the decree holder since the 8th of July, 1904, the present application must be considered as out of time and barred by limitation They also took objection that section 15 of Act No IX of 1908 could not be utilized by the decree holder in computing the period of limitation They raised other objections, but it is unnecessary to go into them so far as the present appeal is concerned The lower court held that if the Act of 1877 applied to the case, (1) the decree holder's application for execution made to the court of Delhi and the injunction which was issued by that court brought the case within article 178 of the Limitation Act of 1877, and (2) as the present application was within three years from the date of the final decision of that suit it was within time If the new Act governed the case then the Court held that the period from the 6th of April 1905 to the 26th of January, 1909 must be excluded from computation In either case the present application was well within time The Subordinate Judge rejected the objections of the judgement-debtors The judgement debtors have now come in appeal to this Court and they contend that the application is time barred and that the court was wrong

in holding that the injunction issued on the 6th of April, 1905, could be utilized by the decree holder in saving limitation

We are of opinion that the application for execution instituted on the 14th of April 1910 may justly be reckoned as within time The date of the decree sought to be executed and the time from which the period of limitation began to run in this case was the 7th of February, 1900 At that time Act XV of 1887 was the Act governing limitation of suits and applications and the article applying to the present proceeding would be article 179 of the second schedule of that Act No question has ever arisen regarding the application made to the court of Delhi on the 8th of July 1904, as being an application which was time barred The flow of limitation was obstructed by the objection decided on the 3rd of December 1904 It is true that that objection was rejected on the 10th of March 1905 but the objection was followed up by a declaratory suit also the act of Hafiz Khairati and Hafiz Ahmad Husain. Next in order came the injunction which was granted on the 6th of April, 1905 This was also an act of the persons above mentioned and not an act of the decree holder It was not until the 29th of June 1907 that the obstructions thus caused were removed and the period of limitation began to run freely again This Court, in *Behari Lal Misr* v *Jagannath Prasad* (1) under similar circumstances held that the article which in such a case applies is article 178 of the second schedule of the Limitation Act, and that the decree holder s right to apply accrued, when by the decree the sale of a share of two villages in that case was set aside ' The present appeal ' the learned Judges went on to say, " having been made within three years from that day was therefore within time Following the precedent therein laid down, *the present proceeding instituted on the 14th of April, 1910* was well within three years of the 29th of June 1907 On the 1st of January 1909 Act No IX of 1908 came into force, [illegible] 1, clause 3 of Act No IX of 1908 and it has been contended [illegible] the present case should be governed by article 182 of [illegible] schedule of the Act Even if so it appears to us that [illegible] court was quite right in holding that section 15 of the [illegible] the decree-holder from limitation being set up again [illegible] Act No IX of 1908 Section 14 which corresponded [illegible] 15

(1) (1906) I L R. 28 All., 651

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of the present Act, made provisions for suits only, and the present Act in computing the period of limitation prescribed for either suits or applications for execution of a decree where execution has been stayed by injunction the time of the continuance of the injunction shall be excluded in favour of the decree-holder. It will be remembered that in this case, an injunction was granted on the 6th of April, 1905, and lasted until the 26th of January, 1909. If this period be excluded in computing the period of limitation the present application is well within the time granted by article 182 of Act IX of 1908. It was contended that the injunction issued by the Delhi court simply prohibited the sale of the property by Hafiz Muhammad Khairati and Hafiz Ahmad Husain, that it did not stay the execution of the decree altogether. In our opinion there is no force in this contention. A decree-holder is not bound to search out and to proceed against all property of which his judgement-debtor may stand possessed. This would only encourage the setting up of 60 years' claim to each property as attached. If he is executing his decree against property which he *bonâ fide* believed to be the property of his judgement-debtor he is executing his decree within the meaning of the law. For this reason we hold that the application made by the decree-holder is not time-barred. It is unnecessary to consider the other pleas taken in this appeal and we dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

1912
April 3.

Before Mr. Justice Karamat Husain and Mr. Justice Chamier.

THE ALLAHABAD BANK, LIMITED, CAWNPORE (APPLICANT) v. MURLIDHAR AND OTHERS (OPPOSITE PARTIES).[*]

Act No. III of 1907 (Provincial Insolvency Act), sections 24 and 26—Insolvency—Application by a creditor to have his name entered in the schedule of creditors—Right of the scheduled creditors to make objections—Revision.

Creditors whose names are already in the schedule prepared under section 24 of the Provincial Insolvency Act, 1907, are entitled to be heard before the debt of a creditor who comes in at the last minute under section 24 (3) of the Act is entered in the schedule.

The facts of this case were as follows:—

Harish Chandar and others, proprietors of a shop called Sukhdeo Das Lachhmi Narain, applied to be adjudicated insolvent to

[*] Civil Revision No. 78 of 1911.

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the Judge of the Court of Small Causes, Cawnpore, who was also invested with powers under Act III of 1907. The applicants were in due course adjudicated insolvent, a receiver was appointed and the 5th of September 1908 was fixed for the proof of debts by the creditors in accordance with the provisions of section 25 of the Act. On proof of such claims as were filed, a schedule of creditors was prepared on the 12th of December 1908 under section 24 of the Act. On the 19th of November, 1909, one Murlidhar, the party opposing this application here applied that his name might be entered in the schedule of creditors claiming that his debts amounted to Rs. 53,614-7-8. On this, the Small Cause Court Judge issued notices to the insolvent, the receiver and the other creditors. After hearing the objections of the receiver and the other creditors and considering the proof filed by Murlidhar he rejected the application of Murlidhar on the 3rd of September 1910. *Murlidhar appealed against this order to the District* Judge of Cawnpore. In this appeal Murlidhar impleaded only the insolvent and the receiver as respondents and did not make the other creditors parties to the appeal. The District Judge refused to hear the objections of the other creditors, set aside the order of the Small Cause Court Judge and ordered Murlidhar's name to be entered in the schedule of creditors. Against this order the Allahabad Bank, Limited, one of the opposing creditors, applied in revision to the High Court.

The Hon'ble Dr. *Sundar Lal*, for the applicant :—

The lower appellate court was clearly wrong in holding that the opposing creditors had no right to be heard. For section 24, clause (3) of the Provincial Insolvency Act expressly gives a right of hearing to the creditors in opposing an application by a third person that his name might be entered in the schedule of creditors. Moreover, the order of the first court could not be set aside without making parties every one affected by that order.

Munshi *Gokul Prasad* (with him Babu *Satya Chandra Mukerji*), for the opposite party :—

The District Judge was perfectly right in setting aside the order of the first court, inasmuch as Murlidhar had proved his debts in accordance with the provisions of section 25 of the Act. Nor did he act in contravention of any provision of law in setting

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aside that order, because the receiver, after his appointment represented all the creditors whose names were entered in the schedule and there was no need of making the creditors parties to the appeal before the District Judge In fact, the creditors had no *locus standi* to oppose the application of Murlidhar who also was one of the creditors The matter was between the petitioning creditor and the court and not between the different creditors The proper course for the opposing creditors was to move the court under section 26 of the Provincial Insolvency Act

The Hon ble Dr *Sundar Lal* was not heard in reply

KARAMAT HUSAIN and CHAMIER JJ —This is an application for revision of an order of the District Judge of Cawnpore, setting aside an order of the Judge of the Small Cause Court of Cawnpore under the Provincial Insolvency Act Harish Chandar and others applied to the Small Cause Court to be declared insolvent In due course an order of adjudication was made, a receiver was appointed and the 5th of September, 1908 was fixed for the proof of their debts by the creditors A large number of creditors put in proofs and in December 1908, a schedule was prepared in the ordinary way under section 24 of the Act Nearly a year later, on the 10th of November 1909 Murlidhar presented a petition to the court praying that his name might be entered in the schedule of creditors He put in an affidavit showing that his claim amounted to over Rs 53,000 The court caused notices of the application to be served on the receiver, and the creditors, whose names were already in the schedule and after lengthy proceedings, which it is unnecessary to detail, came to the conclusion that the proof of the debt was insufficient It accordingly rejected Murlidhar's petition Murlidhar then appealed to the District Judge making as respondents to his appeal the insolvent and the receiver, but he did not make any of the creditors respondents The District Judge allowed the appeal on the ground that the proceedings in the Court of Small Causes held upon the petition of Murlidhar, were irregular and contrary to law He set aside the order of the Judge of the Court of Small Causes, and directed him to take up the petition of Murlidhar again and to dispose [illegible] with reference to the remarks made in his (the learned Judg[illegible]lgement This is an application for revision by the Allahabad [illegible] Limited which

has a claim against the insolvent for over Rs 10,000 It is urged on behalf of the Bank that it was entitled to be heard in the court of the District Judge in support of the order of the Small Cause Court and that the learned District Judge's view of the law is incorrect The learned Judge has held that when an application is made as in this case, under section 24 sub section (3) of the Provincial Insolvency Act, the creditors whose names are already in the schedule are not entitled to be heard in opposition to the petition, that the question arising upon such a petition is one between the petitioning creditor and the court, that all other creditors must stand aside at that stage and that if the petition is accepted the other creditors may move the receiver to take action or may themselves take action under section 26 of the Act

Section 24 sub section 3 distinctly provides that when a petition is put in under that sub section notices shall be served on the insolvent and the other creditors and that the court shall hear their objections if any In the face of the language of the sub section it is impossible to hold with the learned District Judge that the other creditors were not entitled to be heard upon the petition of Murlidhar It is unnecessary to point out how deeply they are interested in the matter The Act evidently contemplates that the other creditors shall be heard before the debt of a creditor who comes in at the last moment is entered in the schedule In our opinion, the Judge of the Small Cause Court was perfectly right in hearing the objections put in by the other creditors The Judge of the Small Cause Court disposed of the petition of Murlidhar on the merits There has been no decision on the merits in the court of the District Judge In our opinion the District Judge should under the circumstances of the case, have caused notices of this appeal to be given to all the creditors and have heard any of them who chose to appear, to resist the appeal and the learned Judge should, in our opinion, have disposed of the appeal on the merits Under section 46 sub section 1 of the Insolvency Act we set aside the order of the District Judge and direct that the appeal be restored to the pending file of his court and be disposed of according to law Costs in this Court will be cost in the cause, and be disposed of by the District Judge

Application allowed

1912
April 10

APPELLATE CIVIL

Before Mr Justice Karamat Husain and Mr Justice Chamier

DALIP SINGH AND OTHERS (DEFENDANTS) v BAHADUR RAM (PLAINTIFF)*

Mortgage—Construction of document— Muakhiza —Act No IV of 1882 (Transfer of Property Act) sections 58 100

A deed the basis of a suit for sale as on a mortgage opened with a recital that the executant had borrowed a sum of money followed by a promise to pay the amount with interest at 2 per cent per month within a certain time and then provided *muakhi a asl o sud ta yom ul wasul upar* (de cription of the s are) *haqiyat min muqir qaim rahega itha a bafarik ti massuk muakhiza-i jaidad ka likhdya.*

Held that this deed could not be construed as a mortgage The word *mua khiza* did not necessarily imply a power of a sale and there was nothing else in the deed from which an intention to give a power of sale could be inferred

THE facts of this case were as follows —

The plaintiff brought a suit for the recovery of Rs 563 14 0, due on a bond, dated the 31st of March 1892, executed by one Moghal Singh in favour of Bahadur Ram The bond provided for the payment of the money secured by the end of Jeth, 1301 Fasli, corresponding to June 1894 The defendants denied execution of the bond and said that as the bond did not amount to a mortgage, the suit was beyond time, having been brought more than 12 years after the money became payable The Munsif held that the bond created only a charge on the property and that the suit was barred by limitation The District Judge, on appeal, held that the bond created a mortgage that section 31 of the Limitation Act of 1908 extended the period of limitation for mortgages as well as charges, and remanded the suit to the first court for decision on its merits The word used in the bond to connote hypothecation was *muakhiza*

Maulvi *Muhammad Ishaq*, for the appellants —

The only question in this appeal is whether the words used in the bond created a simple mortgage as defined in section 58 of the Transfer of Property Act or whether they only amounted to a charge on the property specified in the deed. The words generally used in mortgage-deeds are *rehan arh, mustaghraq makful, ki falat* and the use of the word *muakhiza* which finds a place in section 100 in the authorized Urdu translation of the Transfer of

* First Appeal No 5 of 1912 from an order of Kanhaya Lal District Judge of Azamgarh dated the 18th of September 1911

Property Act—to the exclusion of any of those words, shows that the intention of the parties was to create only a charge on the property for the repayment of the loan *Kishan Lal* v *Ganga Ram* (1), Gour's "*Law of Transfer*" pp 633, 655, *Ghose's Mortgage* p 1043 *Moti Ram* v *Vitai* (2), *Gobinda Chandra Pal* v *Dwarka Nath Pal* (3), *Janardan Vishnu Kulkarni* v *Anant Lakshmanshet* (4)

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DALIP SINGH v BAHADUR RAM

Mr *M L Agarwala*, for the respondents —

The mere use of the word *mustahiza* in the deed does not necessarily imply that the bond in question was not a mortgage bond The intention of the parties has to be gathered from the document read as a whole Charge as defined in section 100 of the Act include every burden on property which does not amount to a mortgage as defined in section 58, and it has to be seen whether the stipulations in the present bond amount to a mortgage The bond provides that the principal and interest due upon it shall be charged upon immovable property specifically described therein It is not very easy to draw a sharp line of demarcation between a mortgage and a charge, but the real difference is that the latter is a much wider term than the former A mortgage involves the transfer of an interest in 'specific immovable property' while a charge does not necessarily, and, while by a charge a title is not transferred and only the repayment of the money is secured out of a particular fund the property hypothecated remains charged in the other, with the liability to repay that debt, *Royzuddi Sheik* v *Kali Nath Mookerjee* (5) There is another distinction between the two A bond creating a charge need not be attested by at least two witnesses, which is absolutely necessary to create a valid mortgage The deed in question is attested by more than two witnesses All the elements necessary to constitute a valid simple mortgage exist in the present case, and as the document created an interest in specific immovable property, there can be no doubt that the intention of the parties was to create a simple mortgage, though the deed does not contain any of those ordinary words connoting hypothecation

(1) (1891) I L R 13 All 28
(2) (1889) I L R 13 Bom 90
(3) (1908) I L R 35 Cal 837
(4) (1908) I L R 32 Bom 386
(5) (1906) I L R 3 Calc 985

1912

Dalip Singh v. Bahadur Ram

Maulvi *Muhammad Ishaq* was heard in reply

Karamat Husain and Chamier JJ —This appeal arises out of a suit brought by the respondent for the recovery of Rs 563 odd by the sale of a share in a village The suit is based upon a document, dated the 31st of March, 1891 which, according to the *respondent, effected a mortgage of the share, but which according* to the appellants effected only a charge on the share If there was a mortgage the suit is maintainable, and the order of the lower appellate court remanding the suit for trial on the merits is correct If there was only a charge the suit is barred by limitation, as was held by the court of first instance and this appeal must be allowed

The deed opens with a recital that the executant has borrowed Rs 991, then follows a promise by him to pay that amount with interest at the rate of 2 per cent per mensem within a certain *time, and after that there are the following words* —

Muakhiza asl o sud ta yom ul wasul upar [description of the share] *haqiyat ... muqir ... qaim rahega ... Isha a ... latarik tamassuk muakhiza jaidad ka likhdya*

If it is a mortgage at all it is a simple mortgage In order that there may be a simple mortgage, there must be *(a)* a transfer of an interest in specific immovable property, *(b)* a personal undertaking by the mortgagor to pay the mortgage money, and *(c)* an agreement express or implied that in the event of the mortgagor failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold The second requirement is satisfied *There is no express transfer of an interest* in property, and there is no express agreement that in case of default the mortgagee may bring the property to sale But in a simple mortgage the interest transferred is the right to have the property sold, and this need not necessarily be provided for in the deed in so many words it may be inferred from the language used and where such an agreement can be inferred the first and third requirements are satisfied We are asked to infer such an agreement from the use of the word *muakhiza* It is conceded that this is not a word commonly employed to denote a simple mortgage The words commonly used are *rehn, kifalat* and *mustaghraq* and their grammatical variations. The root meaning of *muakhiza* is taking and the word is generally used in the sense of taking

1913

Daulat Singh v. Bahadur Ram

atisfaction or calling to account Thus *muakhazidar* is a man who is responsible or called to account There is nothing in the word which necessarily implies taking and selling For what it may be worth we note that the word *muakhaza* is used in the authorized translation of section 100 of the Transfer of Property Act for the word *charge* in the original The words ordinarily used to denote a mortgage were well known in 1891 when the deed in question was executed The word *muakhiza* does not necessarily imply a power of sale and there is nothing else in the deed from which an intention to give a power of sale can be inferred We are unable to hold that the deed conferred upon the creditor a power to bring the property to sale In our opinion the deed is not a mortgage We allow the appeal, set aside the decree of the lower appellate court and restore the decree of the first court The appellants must pay the respondent s costs in all the three courts

Appeal decreed

REVISIONAL CRIMINAL

1912 April, 11

Before Mr Justice Sir George Knox

EMPEROR v THAKUR PANDE *

Criminal Procedure Code sections 107 145—Security to keep the peace—Dispute concerning land likely to lead to a breach of the peace—Procedure

Where there exists a dispute relating to immovable property which is likely to lead to a breach of the peace the magistrate concerned is not necessarily bound to proceed under section 145 but can take action—and this may sometimes be the better course—equally under section 107 of the Code of Criminal Procedure *Sheoraj Roy* v *Chatter Roy* (1) and *Emperor* v *Ram Baran Singh* (2) followed *Mahadeo Kunwar* v *Bisu* (3) distinguished *Balajit Singh* v *Bhoju Ghose* (4) not followed

A magistrate of the first class found after taking evidence that there existed between two parties a serious dispute as to certain immovable property which was likely to give rise to a breach of the peace He also came to the conclusion that one party was attempting on their own authority to set aside a right of long standing The Magistrate however, did not take action

* Criminal Revision No 60 of 1912 from an order of [illegible] Magistrate of Ghazipur dated the 23rd December 1911

(1) (1905) I L R 32 Calc 966

(2) (1906) I L R 28 All 405

(3) (1903) I L R, 2 [illegible]

(4) (1907) I L R, [illegible] Calc, 117

under section 145 of the Criminal Procedure Code, but under section 107, bound over the party which he considered to be in the wrong to keep the peace. Against this order an application for revision was made to the High Court.

Mr. *Ahmad Kareem*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

KNOX, J.—A magistrate of the first class, after taking evidence came to the conclusion that there was great probability of a breach of the peace.

There is apparently between the parties a dispute relating to immovable property and according to the Magistrate one party is trying to set aside a possession of long standing on their own authority, with the result, the learned Magistrate says, that a great riot will take place in pargana Duaba; he accordingly bound down the petitioners before me and required that they should give security for keeping the peace for one year.

I am asked to interfere with this order on the ground that the dispute being a dispute in regard to immovable property, the Magistrate should not have acted under section 107, and in support of this contention I am referred to the case of *Mahadeo Kunwar v. Bisu*. In that case an order had been passed under section 147 of the Code of Criminal Procedure without any of the procedure prescribed by section 145 being adopted, and that order was set aside as an order passed without jurisdiction. The learned counsel relies upon certain dicta contained in the judgement, in which it was laid down that where a report was made by the police that a dispute likely to cause a breach of the peace existed between the parties concerned regarding certain land, the Magistrate should have proceeded in the manner prescribed in section 145 and not under section 107; but the learned Judge has been careful to add that "it was not necessary to decide for the purposes of this case whether the fact of the Magistrate having been informed that a dispute existed in regard to land ousted his jurisdiction to take proceedings under section 107."

I was also referred to the case *Balajit Singh v. Bhoju Ghose* (1). The learned Judges in that case held that as the language of section 145 was mandatory and that of section 107 contained

(1) (1907) I. L. R., 35 Calc., 117.

words which were discretionary, the order passed under section 107 of the Code of Criminal Procedure when there was a dispute relating to land was an order which should be set aside I find however, in the case of *Sheoraj Roy* v *Chatter Roy* (1), the learned Judges of the same High Court held that where a dispute relating to possession of land is likely to cause a breach of the peace a magistrate has a discretion to proceed either under section 107 or under sections 144 and 145 of the Criminal Procedure Code

In *Emperor* v *Ram Baran Singh* (2) a learned Judge of this Court held that a magistrate under similar circumstances might legally take action under section 107 of the Code of Criminal Procedure With that view I entirely concur

It is a matter of experience that cases coming under section 145 are as a rule cases long drawn out and in the interval it is more than probable that owing to the hot blood excited over the matter a breach of the peace might occur The magistrate often does well to take action under section 107 It is open to the petitioners in the present case to move the magistrate having jurisdiction to take action under section 145 if they make out a proper case I have no doubt that the magistrate will take the necessary steps

I find no cause for interference and dismiss the application

Application dismissed

1912
April 13

Before Mr Justice Sir George Knox

EMPEROR v GANGA *

Criminal Procedure Code section 177—Jurisdiction—Effect of place of commission of offence ceasing to be British territory

An offence was committed in March 1910 at a place which was then part of the Mirzapur district Subsequently one of the persons alleged to have taken part in the commission of such offence was arrested in Bengal and sent to Mirzapur where he was committed by the Joint Magistrate to take his trial before the Court of Session In the meanwhile the place where the offence was committed had ceased to be British territory *Held* that this fact did not oust the jurisdiction of either the Magistrate or the District Judge of Mirzapur

An offence was committed on the 18th of March, 1910, at a place which was then within the jurisdiction of the courts of the

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* Criminal Revision No 140 of 1912 by the Local Government from an order of W R. G Moir Sessions Judge of Mirzapur dated the 15th of January 1912

(1) (1905) I L. R 32 Calc 966 (2) (1906) I L. R 28 All 406

1912

EMPEROR v. GANGA

Mirzapur district, and two persons were tried and convicted in respect thereof A man of the name of Ganga, said to have been concerned in the same offence, absconded He was after some months arrested in Bengal, transferred to Mirzapur, and there charged before the Joint Magistrate who committed him to the Court of Session The Sessions Judge referred the question of jurisdiction to the High Court, being of opinion that inasmuch as the scene of the crime had since the 18th of March been transferred to the State of Benares and had ceased to be British territory, he had no jurisdiction to accept the commitment

The Government Advocate (Mr *A E Ryves*) for the Crown

The accused was not represented

KNOX J —The attention of the Court has been called by the learned Government Advocate to the case of *King Emperor* v *Ganga*, charged with an offence under section 392, read with section 75 of the Indian Penal Code

The offence is said to have been committed on the 18th of March 1910 Two men have already been convicted as having been concerned in the offence Ganga was said at the time to have absconded and the case proceeded without his appearance in court

So far as I can learn from the papers which have accompanied the record he was arrested within the Bengal Presidency as being a person without any ostensible means of livelihood He found his way to prison at Mymensingh From this prison he was sent for, it does not appear by what authority and produced before the Joint Magistrate of Mirzapur The Joint Magistrate inquired into the case falling under section 392 of the Indian Penal Code The inquiry began on the 6th of November 1911, and ended in the committal to the Court of Session for trial on the 4th of December 1911

The Sessions Judge of Mirzapur holding that the Joint Magistrate had no jurisdiction to inquire into the case and that his court had no jurisdiction to try the case, directed that Ganga be returned to the custody of the District Magistrate and treated for the purpose of this charge as a prisoner of the Benares state in custody in British territory It is with this order that the learned Government Advocate asks this Court to interfere

The attention of the learned Judge was directed to the case of *Mahabir* v *King Emperor* (1), also to the case of *Ram Prasad* (2), and lastly, to the case of *King Emperor* v *Lachmi* (3)

In all these cases this Court held that the British Court had jurisdiction to try the several cases concerned The learned Judge, however, considered that those cases could be distinguished from the present on the ground that the cases above cited related to persons who had been committed to the Court of Session before the 1st of April, 1911, the date on which certain parganas of the district of Mirzapur were constituted a state and granted to the Raja of Benares He doubts their force as precedents in the present case, where the accused was not arrested until the 8th of October, 1911, and the case was not instituted against him until same date Section 177 of the Code of Criminal Procedure of 1898 enacts that every offence shall ordinarily be inquired into and tried by a court within the local limits of whose jurisdiction it was committed The sections which follow 178 189 do not take the present case out of section 177 At the time when the offence was committed by Ganga it was an offence committed "within the local limits' of the jurisdiction of the Magistrate of the district of Mirzapur, and as a necessary result upon the arrest, the case would, in the ordinary course have been committed to the Court of Session at Mirzapur It matters little to what place the offender betakes himself after he has committed the crime To take an ordinary instance an accused commits an offence within the jurisdiction of the District Magistrate of Mirzapur, he absconds remains in hiding for a year or more, passes through several districts in the course of his flight and is eventually arrested for that offence within the district—say, of the 24 Pergunahs Upon his arrest he is, as a matter of course, upon proper request made, transferred to the court of Mirzapur, his case investigated there, and if it is committed to the Court of Session that court proceed to try and pronounce judgement in the case No question can arise as to jurisdiction.

In the present case the offence was an offence against British Indian law committed by Ganga at a time when he was a British Indian subject at a place which at the time when the crime was

(1) (1911) I. L. R 33 All 578 (2) (1912) 9 A L J. 51

(3) Reference No 338 of 1911 made by the Sessions Judge of Mirzapur to this Court

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committed, was within the local jurisdiction of the Mirzapur courts. It has never been said that Ganga has at any time, since he committed the crime, ceased to be a British Indian subject So far as the record goes, he has apparently since the crime resided in British territory up to the time he was produced before the courts of Mirzapur The mere accident that from the 1st of April, 1911, the spot where he committed the crime has ceased to be British territory appears to me quite irrelevant

Wheaton in his Elements of International Law says —"The judicial power of every independent state extends to the punishment of all offences against the municipal laws of the state by whomsoever committed within the territory also to the punishment of all such offences by its subjects wheresoever committed (Edition 1886 p 179) To the same effect is Phillimore s International Law, 3rd Edition, Vol I p 216 According to Mr Mayne in his Criminal Law 3 Ed, p 956, "the jurisdiction of the *mofussil* courts depends upon the offence having been committed within their local limits' See *Hursee Mahapatro* v *Dinobundo Patro* (1)

To hold otherwise would lead it seems to me to endless complications and might result in very serious miscarriages of justice

So far as the present case is concerned the jurisdiction of the Mirzapur courts which may be said to have commenced with the commission of the offence has neither been suspended nor unbroken.

I therefore, set aside the order of the learned Sessions Judge of Mirzapur, and direct him to try at an early date the prisoner Ganga who has been committed to him, for the offence for which he was committed

Order set aside

(1) (1882 I L, R 7 Calc 523

PRIVY COUNCIL

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June 13

SAJJAD HUSAIN AND ANOTHER (PLAINTIFFS) v WAZIR ALI KHAN AND OTHERS (DEFENDANTS)

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow]

Parda nashin lady—Execution of deed depriving herself of nearly all her property—Burden of proof—Requisites to be proved—Concurrent findings on facts that burden had not been discharged—First court's decision on that point affirmed by appellate court—Finding sufficient to dispose of case

A parda nashin lady separated from her husband unable to read or write and without independent legal advice created an endowment of practically her whole property by a deed of which she appointed the appellants (plaintiffs) trustees In a suit for a declaration that the property was waqf and for possession of it

Held that as they relied upon the deed the onus was on the appellants to show that the nature and effect of it had at the time of its execution been explained to and understood by the executant

Shambati Koeri v *Jago Bibi* (1) followed

Upon the question whether that onus had been discharged the appellate court in India affirmed the decision of the first court to the effect that it had not but nevertheless allowed an appeal to His Majesty in Council under section 596 of the Civil Procedure Code (XIV of 1882) on the ground that the judgement of the lower court had not been *wholly* affirmed

Held that the findings of the Courts below amounted to concurrent findings of fact which could not be disturbed on appeal and there being no 'substantial question of law' the appeal must be dismissed *Karuppanan Servai* v *Srinivasan Chetti* (2) followed

Appeal from a judgement and decree (27th March 1907) of the Court of the Judicial Commissioner of Oudh which varied a decree (30th March 1906) of the Subordinate Judge of Lucknow, by which the appellants suit was wholly dismissed

The suit was brought to obtain a declaration that the property specified in three deeds, dated respectively the 4th of December 1886 the 7th of March 1898, and the 13th of November 19– was waqf (endowed property) and for separate possession of the properties as against the first defendant Nawab Abid H– Khan or in the alternative joint possession of the pro– with him The plaintiffs claim was dismissed by the Sub– Judge but the Court of the Judicial Commissioner o– while affirming the decree as regarded the deed of –

Present —Lord SHAW SIR JOHN EDGE and MR. AMEER ALI

(1) (1902) I L R 29 Calc 749 L R 29 I A., 127
(2) (1901) I L R 25 Mad 215 L R 29 I A., 38

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of November, 1902 reversed it with respect to the property included in the deeds of the 4th of December, 1886, and the 7th of March, 1898 The plaintiffs obtained in India leave to appeal to His Majesty in Council against that portion of the judgement and decree of the Appellate Court which affirmed the decree of the Subordinate Judge The present appeal therefore related only to the portion of the case with which the deed of the 13th of November, 1902 was concerned

The facts, shortly stated were that the deed of the 4th of December, 1886, was a waqf nama, or deed of endowment, which was executed by one Madad Ali and dedicated the properties mentioned therein for the maintenance of a tomb erected by him in the city of Lucknow and for other purposes He appointed two ladies Sardar Begam and Mehdi Begam, trustees of the properties giving them power to nominate their successors Sardar Begam died in December 1889, and Mehdi Begam continued to manage the property alone On the 7th of March, 1898 Mehdi Begam executed a deed by which she added property to the endowment, and appointed Mirza Sajjad Husain the first plaintiff, and Nawab *Abid* Husain Khan, the first defendant, to be trustees of the whole of the endowed property

On the 13th of November 1902, Mehdi Begam executed another deed by which she added other property of the value of about Rs 43,000 to that already endowed, and appointed herself Mirza Sajjad Husain and Nawab Wazir Ali Khan and the second defendant Basti Begam to be the trustees

Mehdi Begam died in February, 1903 and Nawab Abid Husain Khan succeeded as the brother and heir of the deceased, in obtaining possession from the Revenue Court of all her property On the 27th of April 1904 Umrao Mirza, the second plaintiff was appointed a trustee of the endowed property by Basti Begam the second defendant, who retired from the trust

The main defence to the suit was contained in the written statement of the first defendant, and so far as it related to the deed of the 13th of November 1902, was to the effect that that deed was not executed by Mehdi Begam, and that she was at the time of the alleged execution by her, infirm and incapable of understanding it, and that she had no independent advice

As to that the Subordinate Judge said —

There is on this record no evidence except that of Babu Salig Ram and it is not specific and connected with the transaction in question that Mehdi Begam took independent advice before she executed the deed of November 1902. The evidence of Mathura Prasad and of the others who were present at the registration of the document also falls short of the required standard. It does not satisfy me that Mehdi Begam intelligently understood the deed on which she was placing her seal and knew at the time its effects upon her rights as owner of the property comprised in the deed.

Although on the whole there is no sufficient ground for holding that Mehdi Begam did not execute the document the original of exhibit No 8 its intelligent execution by her has not been proved. In my opinion the document is not such as should be given effect to. Proof of a mere formal execution by an illiterate parda nashin in favour of her mukhtar is wholly insufficient.

On appeal the Court of the Judicial Commissioner (MR E CHAMIER First Additional Judicial Commissioner and MR J SANDERS Second Additional Judicial Commissioner) said —

I now come to the question whether intelligent execution of the deed of the 13th of November 1902 was proved. Mehdi Begam was an illiterate parda nashin woman separated from her husband under circumstances which are stated in *Suleman Kadr* v *Mehdi Begum Surreya Bahu* (1). The effect of the deed of 1902 if valid appears to have been to strip her of almost all her property for it left her in possession of some movable property not shown to be of any great value and a wasika and pension which brought her in less than Rs 40 per mensem. The deed was registered not at her house where she lived with her brother but at the *Rauza*. Under these circumstances any one who relies upon the deed must prove that she understood its effect upon her position and probably also that she had independent advice.

And after discussing the evidence the judgement concluded thus —

The learned pleader for the plaintiffs frankly stated that he could not ask us on the oral evidence alone to hold that Mehdi Begam understood the waqf nama. He relied on what he called the circumstantial evidence. He contended that Mehdi Begam had proved herself capable of managing the affairs of the *Rauza* for many years and he pointed out that it was admitted that she had executed the waqf nama of 189 and it was not suggested that she had not understood it. But the deeds differ greatly from each other one dealt with a small portion of her property the other disposed of practically the whole of it. We know nothing of the management of the affairs of the *Rauza* by the Begam, and it is impossible to say how much was done for her by the first plaintiff. There is a provision in the deed of November 1902 by which the first plaintiff and second defendant are authorized to appoint their successors but this power is withheld from the first defendant though he is the brother of the Begam.

It has not been proved that when Mehdi Begam executed the waqf nama she understood its provisions or its effect upon her interests. The deed of 1898

(1) (1893) I L R 21 Calc 135 L R 20 I A 141

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was revocable and she may well have understood that the deed of 1902 also was revocable and it is impossible to say whether she would have executed it had she known that she was stripping herself irrevocably of practically the whole of her property

'For the above reasons I would confirm the decree of the Court below as regards the waqf nama of November 1902

Leave to appeal from the above decision to His Majesty in Council was given by the Court of the Judicial Commissioner (MR L G EVANS, First Additional Judicial Commissioner, and MR H D GRIFFIN Second Additional Judicial Commissioner) on the ground 'that the decision of the Court below was not wholly affirmed by this Court although the applicants only propose to appeal against that portion of the judgement which affirms the decision of the Court below'

On this appeal—

Sir *Erle Richards K C*, and *Ross* for the appellants contended that the Court of the Judicial Commissioner had wrongly held that the intelligent and proper execution of the deed of 13th November, 1902, by Mehdi Begam had not been proved by the appellants and that the deed was consequently invalid, and it was submitted that in the absence of any rebutting evidence on the part of the respondent, the evidence given by the appellants was sufficient to prove their case Under the circumstances with regard to the position of the lady the onus was on the respondent to impeach the deed Reference was made to *Suleman Kadr* v *Mehdi Begum Surreya Bahu* (1) *Tacoordeen Tewarry* v *Nawab Syed Ali Hossein Khan* (2), *Ashgar Ali* v *Delroos Banoo Begum* (3), *Sudisht Lal* v *Mussamut Sheobarat Koer* (4), *Mahomed Buksh Khan* v *Hosseini Bibi*, (5) *Hakim Muhammad Ikram ud din* v *Najiban* (6), and *Shambati Koeri* v *Jago Bibi* (7)

The finding of the Judicial Commissioner s Court was not a finding of fact but a mere statement that the onus had not been discharged and the onus had been placed on the wrong party

(1) (1893) I L R 21 Calc 135 L R 20 I A, 144

(2) (1874) L R 1 I A 192 (204)

(3) (1877) I L R. 3 Calc, 324 (328)

(4) (1881) I L R 7 Calc 245 (250) L R 8 I A 39 (43)

(5) 1888) I L R 15 Calc 684 (694 698 699) L R 15 I A 81 (83 86 90)

(6) (1898) I L R 20 All, 447 L R 25 I A 137

(7) (1902) I L R. 29 Calc 749 L R. 29 I A 127

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SAJJAD HUSAIN v. WAZIR ALI KHAN

De Gruyther, K. C. and *Cowell* for the respondent Basti Begam contended that the onus was on the appellants and they had failed to discharge it. The case was in the nature of an action in ejectment in which the plaintiff had to prove his title. No case decided on facts could be an authority on another case on facts: each case must be decided on its own facts. Reference was made to *London Joint Stock Bank v. Simmons* (1), where the argument of Sir H. Davey to that effect was accepted by Lord Halsbury, L. C. and to *Shambati Koeri v. Jago Bibi* (2) where it was laid down following the case of *Sudisht Lal v. Sheobarat Koer* (3) that in the matter of deeds executed by parda nashin ladies it is requisite that those who rely upon them should satisfy the Court that they had been explained to and understood by those who execute them. The appellants were here relying on the deed and the onus was on them. The question whether the Court was satisfied was a pure question of fact namely whether on the evidence given the party on whom the onus lay had discharged it or not. There was no evidence to show that the deed of 1902 was read out and explained to Mehdi Begam and she had no independent legal advice before executing it, and yet the deed purported to get rid of her whole property. There were on the other hand concurrent findings of fact that she did not understand the provisions of the deed nor its effect upon her interests. The rule as not disturbing the concurrent findings of fact of the Courts below should be applied in this case. Reference was made to *Ram Anugra Narain Singh v. Chowdhry Hanuman Sahai* (4), *Karuppanan Servai v. Srinivasan Chetti* (5) and *Allen v. Quebec Warehouse Company* (6). It was not necessary that the appellate Court should affirm the decision of the first Court on every question of fact, and there was no substantial question of law within the meaning of section 596 of the Civil Procedure Code 1882.

Sir *Erle Richards, K. C.* in reply contended that there had been an error in the way the facts had been dealt with by the first Court

(1) (1892) L. R., A. C. 201, 203, 208.
(2) (1902) I. L. R. 29 Calc. 749 (757); L. R. 29 I. A. 127 (130, 131).
(3) (1881) I. L. R. 7 Calc. 245 (250); L. R. 8 I. A. 39 (43).
(4) (1902) I. L. R. 30 Calc. 303; L. R. 30 I. A. 41.
(5) (1901) I. L. R. 25 Mad. 215 (219); L. R. 39 I. A. 38 (39).
(6) (1886) L. R. 12 A. C. 101 (104, 105).

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The Subordinate Judge ought to have considered the conduct of Mehdi Begam in relation to the trust created and not having done so he had misdirected himself In saying that the sole question was as to the execution of the deed the Court had also misdirected itself The point of law here was that in considering the question of Mehdi Begam s understanding a document which she executed the position, ability, knowledge and habits of the lady were not taken into consideration as should have been done Reference was made to *Mahomed Bulsh Khan* v *Hosseini Bibi* (1) where the result of all the cases was summed up

1912, *June 13th* —The judgement of their Lordships was delivered by LORD SHAW —

This is an appeal from a judgement and decree of the Court of the Judicial Commissioner of Oudh, dated the 27th March 1907 modifying a decree of the Subordinate Judge of Lucknow, dated the 30th March, 1906 The suit was brought on the 1st April, 1905

It prayed for a declaration that all the property comprised in three deeds of endowment was waqf, that is to say, was endowed property, and the plaintiffs (the present appellants) as trustees under these deeds prayed for possession The claim in short was, as stated a ' claim for possession of waqf property by right of trusteeship

The claim of the appellants was dismissed by the Subordinate Judge in its entirety Upon appeal the appellate Court upheld this decree with respect to the property comprised in one of the three deeds of endowment, viz, that of the 13th of November, 1902, and reversed it with respect to the property included in the other two deeds That is to say, the endowments under these two deeds were held good

The only question raised in the present appeal has reference to the last endowment viz that constituted by the deed of 1902 The preceding deeds, one dated in 1886 and one in 1898, were somewhat limited in their character and the defendants contention under which these deeds were attacked is not now further insisted on

Many years ago a tomb or more properly speaking—as their Lordships are informed—a mausoleum, was erected in the city of Lucknow by one Madad Ali now dead, and in 1886 he made a waqf, of certain property for the upkeep of the mausoleum and the

(1) (1888) I. L R. 15 Calc 684 (698 699); L. R 15 I A 81 (92, 93)

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performance of religious observances in connection therewith By the deed of endowment, Mehdi Begam was appointed one of two trustees and upon the death of her co trustee in 1899 she continued to manage the property alone In March 1898 she executed a document whereby she purported to add to the endowment and she appointed the first plaintiff and her brother the first defendant, to be trustees of the original and added property There appears to be no doubt that Mehdi Begam was much interested in the mausoleum and in its endowment, its upkeep and its services She died on the 4th of February, 1903 having on the previous 13th day of November executed another deed—that with regard to which the parties are now in contention

Mehdi Begam was a parda nashin woman she was separated from her husband she was unable to read or write and she was possessed at the date of the deed which is questioned of a fortune of about Rs 50 000 It is not disputed that in the ordinary case of a deed granted by a parda nashin lady it rests upon those founding upon the document to establish that she understood its effect and that the deed was intelligently and properly executed by her

The waqf is undoubtedly of a comprehensive character It proceeds upon the following narrative —

> Whereas this world is unstable and no reliance can be placed on this borrowed life and after death there remains no trace either of soul or body and whosoever has come to this world from non-existence will be completely annihilated one day according to the proverb all that lies over it is mortal but through good and charitable deeds or from one s male issue if he is good and obedient the continuance of one s name is possible I the declarant have no issue of any kind from whom I may hope for the endurance of my name consequently it seems proper to incline myself to the performance of good deeds

The deed thereupon proceeds to endow --

> With possess on in the name of the undermentioned places in my lifet me in connection with the *Rouza* and for its maintenance stability and expenses and also for sending people to Karbala and other holy places as detailed below my personal movable and immovable property as specified hereafter valued at Rs 50 000

She constituted herself as *mutawalli* that is as the manager of the religious endowment and she appointed her brother and her general agent as trustees Among the succeeding clauses the following appears to be important —

> That the trustee shall in my lifetime as well as after my death continue to manage the undermentioned things just like myself and the carrying out of

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the undermentioned things and of the above conditions shall also be binding and incumbent on me as it is incumbent according to the *Imamia* law And for my livelihood my *wasika* and pension are sufficient

That pension amounted as is admitted, to somewhere under Rs 40 per month Power is given for collection of the income of all property conveyed, such collection to vest only in the general agent who was one of the trustees

The document may be described shortly as an *inter vivos* conveyance taking effect *de presenti* and stripping the lady of all her possessions except to the extent of the reservation made to herself of her pension of Rs 40 per month It appears to their Lordships that the deed accordingly is of a character justifying a strict and careful application of the rule operating for the protection of *purda nashin* women and demanding affirmative proof on the subject of their intelligent understanding and execution of deeds attributed to them This view is strengthened by the marked contrast which exists between this document of 1902 and the previous deed of endowment of 1898, which was limited in its scope, was purely testamentary and expressly reserved powers *of management of all the affairs of the endowed property to the* lady herself with power of amending and cancelling the endowment

According to the principles which have always guided the Courts in dealing with sales or gifts made by ladies in such a position (*parda nashin* ladies) the strongest and most satisfactory proof ought to be given by the person who claims under a sale or gift from them that the transaction was a real and *bonâ fide* one and fully understood by the lady whose property is dealt with

This is the language of Sir Montagu Smith in *Tacoordeen Tewarry* v *Nawab Syed Ali Hossein Khan* (1) and is still the law In the words of Sir Andrew Scoble in *Shambati Koeri* v *Jago Bibi* (2)—

It is a well known rule of this Committee that in the case of deeds and powers executed by *parda nashin* ladies it is requisite that those who rely upon them should satisfy the Court that they have been explained to and understood by those who executed them

Accordingly the one and only question in this case is —the burden of proof being thus placed has it been discharged by the party upon whom it rests? In their Lordships opinion Mr *De Gruyther* was justified in founding upon the concurrent findings

(1) (1874) L R 1 I A 192 (206) 13 B L R 427 (430, 431)
(2) (1902) I L R 29 Calc 749; (757) L R 29 I A 127 (131)

on fact of the Courts below The Subordinate Judge, having heard the evidence, says —

> It does not satisfy me that Mehdi Begam intelligently understood the deed on which she was placing her seal and knew at the time its effects upon her rights as owner of the property comprised in the deed

It is unnecessary to go into the details as to the alleged execution of the document in the zenana, as to whether certain witnesses knew the voice of the executant, as to whether the deed in point of fact was read or was read in circumstances giving any indication of its appreciation by the grantor The finding of the Subordinate Judge is as stated In the judgement passed by the Court of the Judicial Commissioner of Oudh the opinion expressed was as follows —

> It has not been proved that when Mehdi Begam executed the waqf nama she understood its provisions or its effects upon her interests

By section 596 of the Civil Procedure Code (Act XIV of 1882) it is specifically provided as follows with reference to appeals to His Majesty the King in Council —

> Where the decree appealed from affirms a decision of the Court immediately below the Court passing such decree the appeal must involve some substantial question of law

Their Lordships put to the learned counsel for the appellants what question of law was here involved and it was replied that while the findings of fact were concurrent the judgement of the Subordinate Judge showed that he had misdirected himself It turned out that this was rested upon the ground that in the course of a long judgement certain materials for arriving at a conclusion had not been set out in the narrative which the judgement contains These materials were of the most elementary character and their Lordships are of opinion that there is no ground for the suggestion that the Subordinate Judge had not taken them into account It would be to misconstrue entirely the provisions as to concurrent findings on fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative of the circumstances minutely and completely exhaustive under the penalty that if they failed to do so, the absence from their mind of elementary considerations might be presumed

The Courts below accordingly having concurrently found that the facts which it lay upon the appellants to establish were not proved it appears to their Lordships that this is to all intents and

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SAJJAD HUSAIN v. AZIB ALI KHAN

purposes a concurrent finding on a matter of fact, and that accordingly such a finding cannot be disturbed. The rules so clearly laid down by Lord Macnaghten in *Karuppanan Servai* v *Srinivasan Chetti* (1) should be followed

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs

Appeal dismissed

Solicitors for the appellants —*W W Box & Co*

Solicitors for the respondent, Basti Begam —*T L Wilson & Co*

J V W

APPELLATE CIVIL

1912 March 20

Before Mr Justice Sir Henry Griffin and Mr Justice Chamier

JAGGI LAL AND OTHERS (PLAINTIFFS) v SRI RAM AND OTHERS (DEFENDANTS)*

Act No XV of 1877 (Indian Limitation Act) schedule II articles 110 116—Suit to recover rent on a registered lease—Limitation

Held that a suit for the recovery of rent based upon a registered lease is governed as to limitation not by article 116 but by article 110 of the Indian Limitation Act 1877 *Ram Narain* v *Kamta Singh* (2) followed.

This was a suit for recovery of arrears of rent based upon a registered lease executed on the 1st of December, 1883, and registered on the 31st of December of the same year The plaintiffs claimed arrears for six years The court of first instance gave them a decree for three years' arrears only holding that as regards the remainder of the claim the suit was barred by limitation The plaintiffs appealed to the High Court

Dr *Satish Chandra Banerji*, for the appellants

Mr *M L Agarwala* and Munshi *Gokul Prasad*, for the respondents

GRIFFIN and CHAMIER JJ —This appeal arises out of a suit for arrears of rent based on a registered lease executed on the 1st of December, 1883 and registered on the 31st of December 1883 The plaintiffs claim six years arrears The court below has given them a decree for three years arrears holding that the claim for three years is barred by limitation.

* First Appeal No 10) of 1911 from a decree of Hari Mohan Banerji, Additional Subordinate Judge of Cawnpore dated the 23rd of January 1911

(1) (1901) I. L R. 25 Mad 215 (219) L R., 29 I. A 38 (39)

(2) (1903) I L R., 26 All., 138

The plaintiffs appeal, and it is contended that the defendants have made an acknowledgement of their liability, which, under the provisions of section 19 of the Limitation Act, operates to save limitation This acknowledgement is said to be found in the defendants account books Extracts of these account books are on the record They contain certain entries relating to the rent of the land in suit The plaintiffs, however, have failed to show that these accounts bear the signature of the defendants or their authorized agent In this respect they have failed to satisfy us that the entries in question operate as an acknowledgement within the meaning of section 19 of the Limitation Act

If is further contended that the lease being a registered one, they are entitled to sue within six years under article 116 In a similar case decided by Mr Justice BURKITT, *Ram Narain* v *Kamta Singh* (1), it was decided that article 110 was applicable to a suit of this nature The learned Judge observed —"I do not understand why when the article (110) apparently plainly provides for the case now before me I should go out of my way and hold that article 116 applies" We entirely agree with the view of Mr Justice BURKITT in the case referred to We are aware that the question has been decided differently elsewhere, but there has been no unanimity of opinion Under these circumstances we prefer to follow the decision of our own Court The appeal is dismissed with costs

Appeal dismissed

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April 13

Before Mr Justice Banerji and Mr Justice Piggott

AHMAD UD DIN (PLAINTIFF) v ILAHI BAKHSH AND OTHERS (DEFENDANTS)*

Muhammadan Law—Gift of a fixed share of offerings made at a shrine—Validity of—Possession of subject of gift

Held that a gift of the right to receive a certain share of the offerings which might be made at a particular shrine was a valid gift and not repugnant to the doctrines of the Muhammadan Law *Amtul Nissa Begam* v *Mir Nurudin Hussein Khan* (2) distinguished

This was a suit to recover possession of certain property as the heir of one Maksud un nissa It was resisted mainly on the

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* First Appeal No 260 of 1910 from a decree of Gauri Shankar Subordinate Judge of Moradabad dated the 21st of June 1910

(1) (1903) I L R, 26 All, 138 (2) (1896) I L R, 22 Bom. 489

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AHMAD-UD-DIN v. ILAHI BAKHSH

ground that the property had been validly transferred by Maksud-un-nissa some years before her death to one Ilahi Bakhsh, the principal defendant The court of first instance dismissed the suit, holding that the deed of gift executed on the 11th of January, 1900, in favour of Ilahi Bakhsh was a valid deed The plaintiff appealed to the High Court where the main ground of contention was that a portion of the property the subject of the deed of gift was not according to the Muhammadan law susceptible of such transfer

The Hon'ble Nawab *Muhammad Abdul Majid* (Maulvi *Ghulam Mujtaba* with him) for the appellant —

A gift of a right to receive offerings is not valid under the Muhammadan law The thing must be in existence at the time A gift of future things is void ; Ameer Ali's *Muhammadan Law*, Vol I, p 36 Baillie's Digest, p 515 The donor cannot give possession of future things, e g, fruits to be borne by a tree and this could not be gifted, *Amtul Nissa Begam* v *Mir Nurudin Hussein Khan* (1), *Sarkum Abu Torab Abdul Waheb* v *Rahaman Buksh* (2) A pension is a kind of property and possession can be given of it—but offerings are different An "incorporeal thing" could not be the subject matter of a gift, Fatwa-i-Alamgiri, Chapter IV

The Hon'ble Pandit *Moti Lal Nehru* (Munshi *Gulzari Lal* with him), for the respondents —

The rule that the thing must be in existence was a corollary from the rule that possession of the thing gifted must be made over But it only applied to things capable of being made over Where the subject of a gift is not capable of being handed over, all that is necessary is that the owner should do all that he can to make it over A gift of an allowance is valid—the test of the thing being in existence would not be satisfied there, because an allowance does not come into existence till it is due. The reason is that the right to recover it is there Of course, its payment could be enforced. So here it was not a right to recover offerings but a right to a share of them when made that was the subject of the gift, Wilson's Muhammadan Law, section 306, p 325

A gift is valid if by any appropriate method of transfer all the control that the subject matter admits of is made over to the donee

(1) (1896) I. L. R 22 Bom 489 (2) (1896) I. L. R, 24 Calc, 83

The Hon'ble Nawab *Muhammad Abdul Majid* was heard in reply

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AHMAD-UD-DIN v. ILAHI BAKHSH

BANERJI and PIGGOTT, JJ —The plaintiff appellant in this case is suing to recover possession, as the heir of one Musammat Maksud un nissa, of certain property in the hands of the defendant, and the defence with which we are concerned is that the lady above mentioned had, on the 11th of January, 1900 that is to say, almost eight years prior to her death, transferred the property in suit by a registered deed of gift to the first defendant Ilahi Bakhsh In the court below the execution of this deed of the 11th of January 1900, was put in issue and questions were also raised as to the mental capacity of the lady donor at the time of the gift, and as to the influence exercised over her by the defendant, Ilahi Bakhsh In the memorandum of appeal now before us the question of the *factum* of execution is again raised We think it sufficient to say that, after considering the evidence, we find no reason whatever to dissent from the conclusion arrived at by the lower court on this point There is a mass of evidence as to the execution of this deed and we do not think that it is in any way adequately rebutted by the inconclusive evidence of the witness Muhammad Husain, who was called as an expert on the question of the thumb impression. We have also examined the evidence of the two witnesses, Asad Ali and Sahib ud din, who were called on behalf of the plaintiff to give evidence regarding Musammat Maksud un nissa s mental capacity On this point also, we think, that the evidence of the witnesses for the plaintiff is of very small value and is entirely outweighed by the evidence on the other side

The main point argued before us relates to a portion only of the gifted property, although we are informed that it is the most important and valuable portion The deed of the 11th of January, 1900, purports to transfer to Ilahi Bakhsh the right of Maksud un nissa to receive a specified share in the offerings made by pilgrims at a certain shrine in the town of Amroha It is contended before us that such a gift is invalid under Muhammadan law because it is a gift of a thing not in existence at the time and incapable of that actual seisin which the Muhammadan law requires in order to make a gift valid We think that the thing gifted in this case must be regarded as being the right of the donor to receive a fixed

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share in the offerings after they have been made, and this is an enforceable right in the sense that it is enforceable in law as against other co sharers in the same Upon the analogy of a transfer by gift of shares in a trading company, it seems to us that the transaction in this case is a transfer of an enforceable right within the meaning of the principle laid down in Mr Ameer Ali s Muhammadan Law, volume I, p 27 of the 3rd edition It is, moreover, a gift of a thing which had a marketable value at the time when the gift was made, because we find on the record abundant evidence that shares in the right to receive offerings at the shrine have been made the subject of transfer in the past by way of sale as well as by way of gift In this view, the transfer in question is different from the making of a gift of what a particular tree might bear in a certain year, as referred to in the Fatwa Alamgiri, vol IV, p 374, quoted at page 36 of Mr Ameer Ali s book already referred to On behalf of the appellant reliance was placed on the case of *Amtul Nissa Begam* v *Mir Nurudin Hussein Khan* (1) We think that that case is clearly distinguishable from the one now before us We may add that we are quite satisfied on the evidence that there was in this case an effective transfer from the donor to the donee and that the latter obtained from the date of the deed of gift such possession as the thing transferred was in its nature capable of This appeal, therefore fails and we dismiss it with costs

Appeal dismissed

1912
April 18

Before Sir Henry Richards Knight Chief Justice and Mr Justice Banerji

MAHANT PURAN ATAL (DEFENDANT) v DARSHAN DAS AND ANOTHER (PLAINTIFFS) *

Civil Procedure Code (1882) section 539—Trust— Public charitable or religious purposes —Trust for benefit chiefly of a particular sect not necessarily not a public trust

Where it was clearly established by evidence that certain property had been held for very many generations for the purpose of supporting and maintaining *fakirs* entertaining visitors and for the giving of alms and there was no evidence that the property was ever held for any other purpose it was *held* that the court ought to presume the existence of a charitable or religious trust within the meaning of section 539 of the Code of Civil Procedure 1882 And the trust was none the less a trust for a public purpose if its main object

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* Appeal No 84 of 1911 under section 10 of the Letters Patent

(1) (1896) I L R 22 Bom. 489

was in fact the support of fakirs of a particular sect and the propagation of the tenets of that sect

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The facts of this case were as follows —

There was a Nanakshahi *math* in the village of Baksar. The defendant appellant was the *mahant* of the *math* and was the *gaddi nashin*. A criminal charge under section 466 of the Indian Penal Code was brought against him and he was convicted of the charge by the lower court. During the pendency of an appeal by him against that order to the High Court, the *mahants* of the neighbouring *maths* assembled and deposed him from the *gaddi* as an improper and unfit person. It was admitted that succession to the *gaddi* was by election. The High Court acquitted the defendant on appeal and quashed the sentence. He went back and took possession of the *gaddi*, turning out the plaintiff Darshan Das, whom the neighbouring *mahants* had installed on the *gaddi* in his place.

Darshan Das with certain other persons brought this suit under section 539 of the Code of Civil Procedure, 1882 for the deposition of the defendant. The defence was (1) that the endowed *math* was not in the nature of a public charity and the position of the defendant was not that of a trustee. (2) If the electoral college was competent to depose him he ceased to be a trustee from the date of his deposition, and as a trespasser the suit was not maintainable against him. (3) There was no breach of trust. The plaintiff himself was not a fit and proper person to be put on the *gaddi*.

The suit was decreed by the court of first instance and the defendant appealed to the High Court. The appeal came up originally before a bench of the Court, consisting of KARAMAT HUSAIN and CHAMIER JJ. The former was for allowing the appeal and dismissing the plaintiffs suit. The latter would have directed further inquiry by the lower court. The result was that the appeal was dismissed. The defendant thereupon appealed under section 10 of the Letters Patent from the judgement of Chamier, J.

Babu *Surendra Nath Sen* for the appellant —

Nothing is known about the origin of the *math*. It is not a public charity, but a private institution—the property being endowed in favour of the *mahant* and his successors in office. A *firman* from the Moghal Emperor, dated 1754, is on record. It

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gave property to one Must Ram, the then *mahant* of the *math*, and his descendants. Descendants meant disciples. There is nothing to show that Must Ram created a trust. The *firman* is in favour of the *sajjada nashin*. What that meant is explained in *Ishtiaq Ahmad* v. *Saiyid Masaod Ahmad* (1). A Muhammadan Emperor could not have created a public charity in favour of a Nanakshahi *math*. He cited Lewin on Trusts, 12th ed., 18. His mistaken notion of his position is not of itself material, *Annaji Raghunath Gosavi* v. *Narayan Sitaram* (2). *Sammantha Pandara* v. *Sellappa Chetti* (3). *Konwar Doorganath Roy* v. *Ram Chunder Sen* (4).

The *mahant* of a *math* is not a trustee, *Vidyapurna* v. *Vidyanidhi* (5). There is a distinction between the manager of a temple and the *mahant* of a *math*. Tagore Lectures for 1908 page 226. Defendant was deposed and ceased to be a trustee.

The Hon'ble Pandit *Madan Mohan Malaviya* (Pandit *Rama Kant Malaviya* with him) for the respondents was not called upon.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit purporting to be brought under section 539 of Act No. XIV of 1882. The plaintiffs allege that there was a charitable trust for public purposes, that they were interested in that trust, that the defendant, Puran Atal, had for some time been a *mahant* and *gaddi-nashin* of the trust, that he had been deposed as being unfit for the office and the plaintiff, Darshan Das, had been duly installed in his place, and that the defendant, Puran Atal, had retaken possession of the trust property. Various reliefs of the nature provided for by section 539 were then prayed for.

The first question which arose was whether or not sanction had been given according to the provisions of section 539. The court held in favour of the plaintiffs and that question has not been argued here.

The next question, which is the most important question in the case, was the question whether or not a public charity existed within the meaning of section 539. The learned Judge held that such a trust did exist. He then went on to hold that the defend-

(1) (1909) 6 A. L. J., 632. (3) (1879) I. L. R., 2 Mad., 175.
(2) (1895) I. L. R., 21 Bom., 555. (4) (1878) I. L. R., 2 Cal., 341.
(5) (1904) I. L. R., 27 Mad., 435.

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ant Puran Atal was not a fit and proper person to be the *gaddi nashin* that he had been duly deposed and that the plaintiff, Darshan Das had been duly installed in his place and was a fit and proper person to hold the office The learned Judge accordingly framed a decree removing the defendant Puran Atal, from the management of the property and directing that the property should be placed under the management of the plaintiff Darshan Das who was to render an account, at certain periods, of the trust property

From this decree the defendant, Puran Atal appealed. On the case coming before a Bench of this Court the learned Judges were not agreed on the question whether or not a "public charitable trust existed within the meaning of section 539 of Act XIV of 1882 Hence the present appeal under the Letters Patent

Section 539 of Act XIV of 1882 is not very grammatically expressed. The words are — In the case of any alleged breach of any express or constructive trust created for public charitable or religious purposes If we were to read these words according to the ordinary rules of construction it would mean "in the case of a breach of trust created for public purposes, or religious purposes It would appear, however that the section has been construed as if the word public qualified the word "charitable" and the word 'religious In the new Code the words have been altered as follows —'In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature We propose to assume for the purposes of this case that the trusts referred to in section 539 of the old Code are same as those referred to in section 92 of the new Code and that accordingly it is necessary before the plaintiffs can claim the reliefs they seek, that they should show that a trust created for a public purpose of a charitable or religious nature exists The evidence has been very fully gone into by the court of first instance and also in the judgements of our learned colleagues It seems very clear that there exists a certain foundation which is called the "Baksar" foundation This foundation owns a number of villages including the village Baksar For very many generations a *nanakshahi fakir* has occupied the *gaddi* and managed the property The defendant Puran Atal has put

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in evidence a document which purports to be a grant of one of the villages namely, the village Kandaha This document, assuming it to be genuine is dated some time about the year 1754 A. D, and purports to be a grant from the Emperor Alamgir II in favour of one Must Ram, a *nanakshahi fakir* With the exception of this document the original grants if such there were, are no longer forthcoming The learned Judge has doubted the genuineness of the document of 1754 and there are grounds for such doubt In the year 1818 or 1819, in a proceeding to which we shall more fully refer presently, a number of *sanads* connected with the property held by the Baksar *gaddi* are stated to have been filed, and this document was not amongst those *sanads* A charitable trust might be created by a grant for the express purpose or a grant having been made in favour of an individual or class of individuals, that individual or class might, after obtaining the grant, create a charitable trust In the present case no evidence of an original grant for a charitable purpose from a ruler save as before mentioned, is forthcoming nor is there in evidence any instrument expressly creating a charitable trust We have it however, clearly established by evidence that for very many generations the property belonging to the Baksar *gaddi* has been held for the purpose of supporting and maintaining *fakirs*, entertaining visitors and for the giving of alms There is no evidence that the property has ever been held for any other purpose In addition to this we have the evidence afforded by the proceeding which took place about the year 1818 or 1819 The document relating to this proceeding is dated the 5th of July 1819 At that time the British Government through the Collector, was considering what should be done in respect of the revenue and succession to the property belonging to this very *gaddi* Questions were put to the *mahant* who claimed to be the *gaddi nashin* at that time His answers amount to express declarations that the property was held for the purpose of supporting and maintaining *fakirs* and visitors and for charitable purposes It would appear that on the strength of such declarations as to the purposes for which the property was held the latter has ever since been held as *muafi*, free from Government revenue Again, in the year 1851, we have a deposition of the *mahant* for the time being in which it is declared that the

property has always been held generation after generation for the purposes we have already mentioned Questions connected with the succession to the property and the rights of *fakirs* have from time to time come before the court, and it has always been assumed that the property was the property of the *gaddi*, managed by the *gaddi nashin* for the time being and held for charitable purposes

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In our opinion the Court on this clear and uncontradicted evidence, not only is entitled to presume but ought to presume the existence of a charitable or religious trust The next question is whether this trust was for a 'public purpose within the meaning of the Code The property was held for the support of *fakirs*, entertaining visitors and giving alms and generally for charitable purposes Even if we assume that the main purpose of the trust was to support *Nanakshahi fakirs* and to spread the religion founded by *Nanak* we think that the trust was for a "public purpose within the meaning of the section This was the opinion of the learned District Judge and also of one Judge of this Court In our opinion the case was a case coming under section 539

The next question which arises is whether or not on the evidence we ought to hold that the conduct of the defendant, Puran Atal, was such as to render him unfit to hold the office of *gaddi-nashin* and to entitle the plaintiffs to relief in this Court A large amount of evidence was given which went to show that Puran Atal was a man of immoral character Contrary to the rules of the priesthood he kept a woman. He had also created a scandal by his intrigues with a *chamar* woman There was also evidence to show that he had spent the income of the property in building houses for the members of his family and in giving ornaments to his mistress There was evidence to show that he neglected to devote the income to charitable purposes The court of first instance believed this evidence This Court is always reluctant to overrule the decision of the court of first instance on a pure question of fact, particularly where that court has had (as in the present case) the advantage of seeing and hearing the witnesses upon both sides. In the present case there is a strong additional reason why we should hesitate to interfere with the decision of the court below upon this question. It would appear that Puran Atal had been deposed by a large number of the *fakirs* of the *Nanakshahi* sect—not only the

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fakirs interested in his own particular *gaddi*, but also the *fakirs* of the neighbouring *gaddis* of the same sect In our opinion we ought to accept the finding of the court of first instance on this question

It is next said that the *mahants* who purported to depose Puran Atal from the *gaddi* had no power to do so The learned District Judge was satisfied that there was a usage which entitled the *mahants* to depose a *gaddi nashin* for misconduct, and that they were entitled in the same way to elect a successor So far as the election of a successor is concerned, it would appear that Puran Atal owes his seat on the *gaddi* to selection carried out in the very same manner in which the plaintiff Darshan Das, was selected in the present case, the only difference being that in the case of Puran Atal his immediate predecessor disappeared it is supposed in consequence of his being murdered

Some slight effort has been made to show that Darshan Das is not a fit and proper person to be a *mahant* This was no part of the defendant s original case Darshan Das has been selected by the body of *fakirs* as a fit and proper person, and we agree with the learned District Judge that it is well, so far as possible to accept the selection of the sect as to the person who ought to occupy the *gaddi*

In our opinion the appeal altogether fails We accordingly dismiss it with costs

Appeal dismissed

1912
April 24

FULL BENCH

Before Sir Henry Richard Knight Chief Justice Mr Justice Banerji and Mr Justice Chamier

RASHID UN NISSA (DEFENDANT) v MUHAMMAD ISMAIL KHAN AND ANOTHER (PLAINTIFFS)*

Mortgage—Decree on mortgage—Decree set aside as against one mortgagor—Second suit to recover proportionate share of the debt maintainable

A mortgagor died leaving him surviving a brother two daughters and an illegitimate son The four sons of the brother took an assignment of the mortgage from the mortgagee and subsequently brought a suit for sale of the mortgaged property against the children of the mortgagor and inasmuch as they were themselves owners of part of the mortgaged property framed their suit as one

* First Appeal No 3 0 of 1910 from a decree of Muhammad Husain Additional Subordinate Judge of Meerut, dated the 16th of June 1910

for the recovery of specific shares of the mortgage money from the portions of the property in the possession of each of the defendants They obtained in this suit an *ex parte* decree which however was set aside as against one of the daughters upon the ground that she was a minor and not properly represented therein

Held that the plaintiffs were not precluded from maintaining a fresh suit against this defendant for the recovery of a share in the mortgage debt proportionate to her share in the property

The facts of this case were as follows —

One Sardar Khan mortgaged three biswas out of his ten biswas in the village Gessupur to one Achal Das on the 31st of January, 1882 He died sometime in May 1888 leaving two daughters Rashid un nissa and Ulfat un nissa, a brother, Mauladad Khan, and an illegitimate son called Abdul Majid Before his death Sardar Khan executed a deed of gift in favour of his son on the 27th of March 1888 of one biswa in the village After his death there was an arbitration among his heirs and in the distribution of the property Rashid un nissa who was a minor at the time and was represented by her sister got 2¼ biswas instead of 3 biswas, her share under the Muhammadan law, and her sister received an equal share Mauladad Khan also got one biswa and odd and Abdul Majid who was no heir under the Muhammadan law, got 2 biswas and 12 biswansis The award was dated the 12th of June 1889 On the 8th of April, 1889 the bond of January, 1882 was assigned by Achal Das to Ismail Khan Taj Muhammad Khan, Niaz Muhammad Khan and Dost Muhammad Khan, the four sons of Mauladad Khan Niaz Muhammad was married to Rashid un nissa The assignees brought a suit on the bond on the 4th of January 1894 against the two daughters of Sardar Khan and against Abdul Majid and got a decree on the 28th of August 1894 The decree was satisfied in part by Ulfat un nissa and Abdul Majid who transferred their shares under the award to the four assignees by sale deeds bearing date August 1897 So far as Rashid un nissa's share of liability was concerned the other 3 sons of Mauladad Khan sold their interests in the decree to Niaz Muhammad Khan the husband of Rashid un nissa, and in consideration got a bond from him, dated the 19th of August 1897 Rashid un nissa then brought a suit to set aside the award and the decree on the ground that she had not been properly represented in those proceedings and her suit was finally decreed by the Privy Council in July, 1909, *cf Rashid-un nissa* v *Muhammad Ismail Khan* (1)

(1) (1909) I L. R., 31 All 572

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RASHID UN NISSA v. MUHAMMAD ISMAIL KHAN

and she was given her full share i e 3 biswas in the property of her father, the award and the decree being declared not binding on her In the meantime a suit was brought against Niaz Muhammad Khan on his bond of the 17th of August 1897, but it was dismissed on the 29th of November, 1909, after the judgement of the Privy Council in Rashid un nissa's case on the ground that there was no consideration for the bond

The present suit was brought by two of the brothers of Niaz Muhammad Khan against Rashid un nissa for the proportion of mortgage money due on bond of 1882 chargeable against her share of the property The claim was minus the share of Niaz Muhammad Khan in the amount due Out of the 3 biswas originally mortgaged her share was 16 biswansis and odd Abdul Majid was also made party to the extent of ten biswansis

The Hon ble Nawab *Muhammad Abdul Majid* for the appellant —

The decree of 1894 was still subsisting It was against the two sisters and Abdul Majid and was a joint decree It was against the entire property mortgaged and could have been recovered from any one of them The Privy Council did not set aside the decree but only declared that it was not binding on Rashid un nissa The decretal money could be realized from the other two and then they could come for contribution against Rashid un nissa They have got a decree for Rs 4 000 they cannot get another decree That the Privy Council did not set aside the entire decree is manifest from the report in I L R, 31 All 572

Maulvi *Muhammad Rahmatullah* for Maulvi *Ghulam Mujtaba* (with the Hon ble Pandit *Moti Lal Nehru*) for the respondent was not called upon to reply

RICHARDS C J and BANERJI and CHAMIER J J —The suit out of which this appeal has arisen was brought to enforce a mortgage of the 31st of January 1882 executed by one Sardar Khan in favour of one Achhal Das under the following circumstances The property comprised in the mortgage was 3 biswas out of 10 biswas Sardar Khan died in 1885 leaving him surviving two daughters a brother and an illegitimate son The appellant Rashid un nissa is one of those daughters The mortgage of the 31st of January 1882 was assigned by Achhal Das, the mortgagee to the plaint

iffs and their brothers who were the sons of Mauladad Khan, the brother of Sardar Khan. The plaintiffs in 1894 along with their brothers brought a suit upon their mortgage against the two daughters of Sardar Khan and against Abdul Majid, his illegitimate son and they obtained a decree on the 28th of August 1894 In 1897 Rashid un nissa brought a suit to have this decree set aside We may mention that before the suit of 1894 was brought an arbitration award had been made under which certain shares were allotted to the daughters the brother and the illegitimate son of Sardar Khan The object of Rashid un nissa s suit was to have the decree and the award set aside in so far as they affected her interests She obtained a decree from the Privy Council in 1900 and under that decree she was restored to possession of three biswas out of the 10 biswas owned by Sardar Khan After the passing of the Privy Council decree to which we have referred the plaintiffs, who are two of the assignees of the bond of 31st of January 1882, brought the suit out of which this appeal has arisen and they seek to recover from Rashid un nis a s share of the mortgaged property her proportionate share of the mortgage debt The court below has decreed their claim

It is contended here that as the plaintiffs had already obtained a decree on the mortgage of 1882, they could not maintain a second suit on the basis of the same mortgage, and the foundation for the contention is that the decree obtained in 1894 was a joint decree against the whole of the mortgaged property and could be enforced against any part of that property and is therefore, capable of enforcement as against the property of the heirs of Sardar Khan other than Rashid un nissa, present appellant for the full amount alleged to be due for her share of the mortgage debt

On referring to the decree we find that the prayer in the suit in which it was passed was that for the amount claimed the mortgaged property should be ordered to be sold according to the specification given in the plaint and in the specification given at the foot of the plaint the share of each heir is separately specified. In the decree also the share of each heir is separately specified as also the amount of demand against each of those shares This was a natural claim in view of the fact that the integrity of the mortgage had been broken up by reason of the plaintiffs having

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RASHID-UN NISSA v. MUHAMMAD ISMAIL KHAN

acquired the share of their father Mauladad Khan, which was also liable for the mortgage debt It further appears that the plaintiffs had purchased at auction another part of the mortgaged property So that it is manifest that the mortgage did not subsist as one indivisible mortgage, but each of the persons liable was only liable to the extent of his or her proportionate share of the debt It was for this reason that the plaintiffs in the suit of 1894, claimed from each heir a proportionate part only of the mortgage debt and sought to bring to sale the share of that heir only for the realization of that part This was the claim which was decreed, and therefore we must hold that the decree was in effect a separate decree against each of the heirs for the proportionate liability of that heir That being so Rashid un nissa's share was, according to that decree liable for her proportionate share of the mortgage debt By the decree of the Privy Council obtained by her that decree having been set aside, the plaintiffs are entitled to recover from her the portion of the mortgage debt for which she is liable

It is next urged that the court below ought to have given credit to the appellant for any amount which Abdul Majid may have paid in excess of his quota of liability This contention is, in our opinion untenable and the view taken by the court below in regard to it is correct.

We, accordingly, dismiss the appeal with costs We extend the time for payment of the mortgage money for a period of six months from this date

Appeal dismissed

1912
April 26th

APPELLATE CIVIL

Before Sir Henry Richards Knight Chief Justice and Mr Justice Banerji

LALI JAN (DEFENDANT) v MUHAMMAD SHAFI KHAN (PLAINTIFF)*

Muhammadan law—Hanafi law—Gift—Construction of document—Condition in derogation of the grant invalid

A deed of gift of certain property provided as follows —

My son Naki Khan will remain owner (*malik*) of the remaining two thirds and of the said two-thirds Naki Khan will remain full and absolute owner of one-third (*malik kamil o kabiz*) and he shall have the powers of an owner with respect to it and Naki Khan will be owner (*malik*) of the other third also and his name will be entered in the khewat but the income of it is given for the

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* Appeal No 144 of 1911 under section 10 of the Letters Patent

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maintenance of my minor grandson Muhammad Shafi Khan son of Muhammad Taqi Khan, deceased According to law Naki Khan is guard an of Shafi Khan he must give the income of that one third for the maintenance of the minor and Naki Khan will not have the power of transfer over that one-third during the life of the minor

Held on a construction of the deed that the condition against alienation was invalid but the condition as to the payment of one third of the income to Muhammad Shafi Khan was valid and attached to the property in the hands of a transferee who was found to have notice thereof *Nawab Umjad Ally Khan* v *Mussumat Mohumdee Begum* (1) followed

This was an appeal under section 10 of the Letters Patent from a judgement of CHAMIER, J The facts of the case are fully stated in the judgement under appeal, which was as follows —

"Musammat Tamanna Begam executed a *tamliknama* whereby she made one-third of certain property *waqf* and provided as follows with regard to the remaining two-thirds —

My son Naki Khan will remain owner (*malik*) of the remaining two-thirds and of the said two thirds Naki Khan will remain full and absolute owner of one-third (*malik kamil o latai*) and he shall have the powers of an owener with respect to it and Naki Khan will be owner (*malik*) of the other third also and his name will be entered in the khewat but the income of it is given for the maintenance of my minor grandson Muhammad Shafi Khan son of Muhammad Taqi Khan deceased According to law Naki Khan is guardian of Shafi Khan he must give the income of that one-third for the maintenance of the minor and Naki Khan will not have the power of transfer over that on third during the life of the minor

Soon after Naki Khan sold the whole two-thirds of the property to the respondents Lali Jan who is said to be a prostitute In the present suit the appellant Shafi Khan suing by his next friend prays for possession of one-third of the property and for cancellation of the deed of sale in favour of the respondent The defence is that the whole two-thirds of the property were given to Naki Khan and under the Muhammadan law the conditions that he should not have power to transfer portion of the property and should make over the profits of that portion to Shafi Khan are invalid and must be disregarded

The Munsif held that Shafi Khan was entitled to the profits of one third of the property but not to possession of that share and passed a decree accordingly

Both parties appealed and the District Judge held that all the conditions regarding one third of the property were void and that the respondent was not bound to make over the profits of that share to the appellant Accordingly he dismissed the appeal of Shafi Khan allowed the appeal of Lali Jan and dismissed the suit of Shafi Khan with costs Shafi Khan has appealed to this Court S A No 1119 is his appeal against the decree passed on his appeal to the District Court S A No 1120 is his appeal against the decree passed on the respondent's appeal to that court

(1) (1867) 11 Moo I A 517

1912

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v
MUHAMMAD SHAFI KHAN

"It is in the first place contended that the *tamlikknama* gives one third of the property to Shafi Khan out and out If this view is correct the appellant must succeed I think however that it is impossible to construe the *tamlik nama* as giving Shafi Khan one-third of the property out and out It is possible to construe the deed as giving him one third for life and to regard the provision that it shall stand in the name of his uncle as an arrangement for the management of the property But it appears to me that according to the correct construction of the deed Naki Khan takes the whole two-thirds out and out and the intention was to bind him to allow Shafi Khan to have the profits of one-third for his life The question is whether such a condition is permitted by the Muhammadan law The parties are *Sunnis* According to the Hanafi Law any derogation from the completeness of a gift is null and if the intention to give to the donee the entire subject matter be clear subsequent conditions derogating from or limiting the extent of the right are null and void In other words, according to the Hanafi law the gift is valid and the condition is void (Ameer Ali on Muhammadan law vol I p 77) According to the same authority if a man was to give a piece of land to another on the condition that he should give to him the whole produce of the land in perpetuity the condition would be bad but it is otherwise with a gift by A to B without any restriction on the power of disposition but subject to the condition that B should pay periodically to A a part of the usufruct of the property both the gift and the condition would be valid and if B should alienate the property the assignee would take it subject to the condition In these cases says the learned author the reason is obvious for the reservation of an interest by the donor for himself or for himself and his heirs does not interfere with the right of property vesting in the transfer by the act of transfer For these propositions he cites the case of *Nawab Umjad Ally Khan* v *Mohumdee Begum* (1) and the Nawadir an authority which I have been unable to consult SIR ROLAND WILSON (p 334) states the law in the same way but doubts the correctness of the decision in the case just cited That was however a decision of their Lordships of the Privy Council, and it is binding upon me if it applies to the present case The parties to that case were Shiahs but the decision does not purport to rest upon any peculiarity of the Shia law According to it the condition that the donee Naki Ali Khan, shall pay the usufruct of part of the property to his nephew is valid

The condition that Naki Ali Khan shall not alienate the property seems to be invalid The respondent contends that she is not bound by the condition regarding the payment of the usufruct to the appellant because she is a purchaser for value and the property is not charged with the payment of the usufruct to the appellant I cannot accept this contention She must have had notice of the condition for it was contained in the deed under which Naki Ali Khan acquired title to the property She holds the property on the same terms on which Naki Ali Khan held it

For the above reasons I dismiss S A No 1119 with costs and I allow S A. No. 1120 with costs here and in the lower appellate court and restore the decree of the court of first instance.

(1) (1867) 11 Moo I A 517

The defendant alone filed an appeal under section 10 of the Letters Patent. 1913

LALI JAN v. MUHAMMAD [illegible] KHAN

Mr *Abdul Raoof* for the appellant —

The view taken by the learned Judge is wrong The condition attached to the gift under the Muhammadan law is invalid. The view taken by the learned Judge is correct under the Shia school of Muhammadan law but not under the Sunni school The parties in the present case are Sunnis The ruling laid down by their Lordships in *Nawab Umjad Ally Khan* v *Mussumat Mohumdee Begum* (1) does not apply, as the parties there were Shias Mr Ameer Ali's view is not in keeping with the orthodox school of Muhammadan law and should not be given effect to He modernizes the Muhammadan law which may be good, but it is not the law as it is understood in India SIR ROLAND WILSON has criticised the ruling in 11 Moore's Indian Appeals

Pandit *Mohan Lal Sandal* for respondent —

The case in 11 Moore's Indian Appeals is not based upon any peculiarity of Shia law Though the parties in that case were Shias, their Lordships referred to the Hedaya which is an authority under the Sunni School of Muhammadan Law See Ameer Ali's Mahomedan Law vol I pp 77 78, 85 and 86, Hedaya, p 482, Abdul Rahman's Institutes of Musalman Law Art 439, pp 259 and 442, *Kasim Husain* v *Sharif un nissa* (2)

Mr *Abdul Raoof* was heard in reply

RICHARDS, C J, and BANERJI, J —The facts of the case and the questions of law which arise in it are fully dealt with in his judgement by our learned brother In our opinion the conclusion at which he arrived is supported by the decision of their Lordships of the Privy Council in *Nawab Umjad Ally Khan* v *Mussumat Mohumdee Begum* (1) That was no doubt a case between Shias, but the rule of law was considered as applying equally to Shias and Sunnis This has been shown by Mr Ameer Ali on page 88 of Vol I of his well known work on Muhammadan law We dismiss the appeal with costs

Appeal dismissed

(1) (1867) 11 Moo I A 517 (2) (1883) I L R 5 All, 285

1912
May 3

FULL BENCH

Before Sir Henry Richards Knight, Chief Justice Mr Justice Karamat Husain and Mr Justice Chamier

THAKUR DIN RAM AND ANOTHER (DEFENDANTS) v HARI DAS (PLAINTIFF)

Act No IX of 1908 (Indian Limitation Act) schedule I article 152—Limitation—Appeal—Jurisdiction—Appeal presented to Judge at his private house after court hours

A memorandum of appeal was presented to a District Judge at his private house after court hours on the last day of limitation *Held* that the Judge had jurisdiction to accept the m morandum of appeal so presented though he was not obliged to do so *Jai Kuar* v *Heera Lal* (1) overruled.

THE facts of this case were as follows —

The plaintiff s suit was decreed by the first court on the 23rd of December, 1910, judgement being delivered at about 4 p m. The courts were closed for the Christmas vacation from the 24th of December, 1910 to the 13th of January, 1911, both days inclusive The defendants applied for copies of judgement and decree on the 14th of January 1911, the day the court re opened and presented the appeal on the 27th of January, 1911, at 4 50 p m, to the District Judge at his house The last day for filing the appeal was the 27th of January if the time during which the courts were closed (*viz* the 24th of December, 1910, to the 13th of January 1911) were not excluded The District Judge on the 28th of January noted the fact of presentation the day before, and admitted the appeal, subject to objections at the hearing At the hearing on the objection of the respondent, the District Judge held that the presentation at his private residence was not a valid presentation and the appeal was time barred The defendants appealed

On the appeal coming on for hearing before KARAMAT HUSAIN and CHAMIER J J they referred it to a larger Bench by the following order —

"The question for decision in this second appeal is whether as held by the lower appellate court the defendants appeal to that court was barred by limitation If the appeal was barred by limitation the further question arises whether the District Judge should have considered whether the defendants had sufficient cause for not filing the appeal within limitation

* Second Appeal No 574 of 1911 from a decree of J H. Cuming District Judge of Jaunpur dated the 2nd of March 1911 confirming a decree of Hari har Prasad City Munsif of Jaunpur dated the 23rd of December 1910

(1) (1874) 7 N W P H C Rep, 5

The suit was decided by the Munsif on the afternoon of December 1910 The civil courts in the district were closed from the 24th of December till the 13th of January When the courts re-opened on the 14th of January the defendants applied for a copy of the judgement and decree and obtained it in five days The appeal to the lower appellate court would have been in time if presented on or before the 27th of January 1911 On the last mentioned date the defendants pleader took the appeal to the District Judge s house and there presented it to him at 4 50 p m He received it and took it to court with him on the following day It was then discovered that there was a deficiency of six annas in the court fee on appeal. That was made good at once and nothing turns on that

The appellants contend that the appeal was presented within time both because it was received by the District Judge within limitation though after the usual court hours and at an unusual place and because the period during which the courts were closed should be treated as part of the time requisite for obtaining copies of the judgement and decree On the first point the decision of this court in *Jai Kuar* v *Heera Lal* (1) is against them On the second point the decision of the Madras High Court in *Saminatha Ayyar* v *Venkata subba Ayyar* (2) is in their favour but seems to me to be inconsistent with the decision of the Full Bench of this Court in *Bechi* v *Ahsan ullah* (3) by which we are bound, and which we think is correct

As at present advised we are of opinion that the decision in *Jai Kuar* v *Heera Lal* is erroneous and should be overruled We think that it is clear that a Judge is not bound to receive an appeal after court hours at his private house but that if he does so it should be held that the appeal has been presented to him for the purposes of limitation

We direct that the record of the case be laid before the Hon ble the Chief Justice with a view to its being placed before a larger Bench

We have considered the question whether the Judge should have inquired whether the defendants had sufficient cause for not presenting the appeal with in time It appears to us that it was not his duty to do so He was not asked to do so and there was no affidavit before him as to the facts The affidavit filed in this court cannot be used for the purpose of establishing facts which might have been but were not placed before the District Judge In the circumstances we are unable to hold that the appellants have established sufficient cause for not presenting their appeal before the time at which it was actually presented

The appeal was then argued before a Full Bench

Babu *Piari Lal Banerji*, for the appellant

The appellants were entitled to exclude the period within which the courts were closed for the vacation as time requisite for obtaining copies The application for copies was made at the very earliest opportunity that it could be made and it was not possible for the appellants to apply for copies earlier when the

(1) (1874) 7 N W P H C Rep, 5 (2) (1903) I L R, 27 Mad 21
(3) (1889) I L R 12 All 464

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Thakur Din Ram v Hari Das

judgement was delivered after 4 p m on the 23rd of December According to the rules prevailing in the lower courts applications for copies are not received at that hour of the day, and it is a well known principle of law that if the parties are prevented from doing a thing in court on a particular day not by their own act or omission but by the act or omission of the court, they are entitled to do it at the first opportunity, and their act will be deemed to have been done at the earliest period of time at which it could have been done As the appellants applied immediately on the re opening of the court on the 14th of January the law must attribute to them the intention of apply ing on the very day judgement was delivered if it were possible for them to do so The matter would have been different if the appellants had waited one day even after the re opening of the courts to apply for copies He would not then have been entitled to the benefit of the exclusion of the holidays The time required for obtaining copies must in each case be a question of fact depending on the circumstances of each particular case, as was correctly laid down in *Thanamal* v *Bihali* (1) Under identical circumstances the Madras High Court had ruled that the vacation ought to be excluded, *Saminatha Ayyar* v *Venkata subba Ayyar* (2) This case was not at all at variance with the principle underlying the Allahabad cases as that court expressly laid down that—under the special circumstances of that case which were identical with those of the present case — the vacation ought to have been excluded as being a portion of the time required for obtaining copies This court, it is true, has held in Full Bench that the time required for obtaining copies did not begin to run till the application was actually made, *Bechi* v *Ahsan-ullah* (3)

In the first place the point for decision in the present case did not arise in that case and the remarks were only *obiter dicta* It further pre supposed that it was possible for the party to apply for copies at an earlier period and did not purport to deal with a case where it was not possible for a party to apply earlier In fact Mahmood J, in dealing with an hypothetical case similar to the present, was of opinion that the application would, under those

(1) (1894) Punj Rec. 6 (2) (1903) I L R 27 Mad 21

(3) (1890) I L R 12 All, 461

circumstances, be presumed to have been made before the holidays All the remarks in the above case must be read as subject to the facts of that particular case And in a later case many of those remarks were held to be *obiter dicta* and not binding, *Siyadat un nissa* v *Muhammad Mahmud* (1)

As to the next point it was open to the District Judge to accept an appeal in court after the usual court hours. It was also open to the District Judge to hold his court during court hours at his private residence, and there was no reason to suppose that the District Judge had no jurisdiction to accept an appeal at his private residence after court hours It was of course, open to the District Judge to refuse to do anything at home but having accepted the appeal it was not open to the other side to object The case of *Janki Kuar* v *Heera Lal* (2) was wrongly decided

Lala *Purushottam Das Tandan* for the respondents —

[RICHARDS C J —We want to hear you on the question as to whether the appeal was validly presented at the house of the District Judge]

The question whether the appeal if presented after the usual court hours was yet within time, if presented before the day had expired depended on the meaning that would be given to the word 'day If 'day' meant the usual calendar day of 24 hours parties would be entitled to present suits and applications up to 12 o clock in the night and yet there are absolutely no arrangements made for the receipt by any officer of such appeals and applications at such unusual hours The word day could only mean the court day consisting of the hours as fixed by this court The District Judge after he had left court ceased to be a District Judge and was only a private individual and by accepting the appeal he could not constitute himself a District Judge Moreover he passed no order then and there but simply received the appeal and acted as the hand to present the appeal on behalf of the appellant on the next day in court He never purported to exercise any judicial function as District Judge when the appeal was presented To take an illustration, if the District Judge were abused at home he could not constitute himself a court for the purpose of instituting con tempt pro eedings He could not any more constitute himself a court for the purpose of receiving the appeal

(1) (1897) I L R, 19 All, 342 (2) (1874) 7 N W P, H. C. Rep 5

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THAKUR DIN RAM v HARI DAS

Babu *Piari Lal Banerji* was not called on to reply

RICHARDS C J and KARAMAT HUSAIN and CHAMIER, J J —The facts of this case are as follows —The Munsif delivered judgement in this case on the evening of the 23rd of December, 1910, allowing the plaintiff's claim in full The Christmas vacation began the next day and the court did not re open till the 14th of January 1911, after the Muharram holidays The appellants applied for a copy of the judgement and decree on the 14th of January and obtained it on the 19th On the evening of the 27th of January, they handed an appeal to the District Judge at his private residence If this can be deemed a sufficient presentation of the appeal, the appeal is within time The District Judge dismissed the appeal as barred by limitation, on the strength of the ruling in *Jai Kuar* v *Heera Lal* (1) In our opinion the appeal must be deemed to have been presented within time No doubt, the learned District Judge might have refused to receive the appeal out of court hours but he did not think fit to do so He received the appeal and subsequently made an endorsement on it, showing that it had been presented to him at 4 50 p m on the 27th January, and stating that it would be admitted if it was found to be within limitation and the other requirements of the law had been complied with No reasons are given in the ruling of this Court referred to above and we do not think that it should be followed It is a matter of common knowledge that applications are in cases of emergency made to judges at their private residences, and are received by them It is impossible to hold that Judges act in such circumstances without jurisdiction. The present case was one of emergency The 27th of January was the last day of limitation for the appeal In our opinion the learned District Judge was justified in receiving the appeal at his private residence and the appeal must be deemed to have been presented within time The District Judge was right in following the ruling of this Court, but for the reasons which we have given we think that that ruling was erroneous We set aside the decree of the District Judge and remand the case to him with directions that the appeal be restored to the pending file and disposed of according to law Costs here and hitherto will be costs in the case

Appeal decreed and cause remanded

REVISIONAL CRIMINAL

1912 May 6

Before Mr Justice Karamat Husain

GANESHI LAL v NAND KISHORE

Criminal Procedure Code section 179—Criminal misappropriation—Jurisdiction—Place where consequence of act ensued

The word consequence in section 179 of the Criminal Procedure Code means a consequence which forms a part and parcel of the offence It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence

Hence where an agent in charge of a branch shop in Sultanpur misappropriated money belonging to his principal which should have been sent to the head office at Cawnpore it was *held* that the courts at Cawnpore had no jurisdiction to try the agent for criminal misappropriation *Queen Empress v O Brien* (1) and *Colville v Kristo Kishore Bose* (2) distinguished *Babu Lal v Ghansham Das* (3) referred to

A complaint was lodged before a Magistrate of the Cawnpore district by one Nand Kishore carrying on business at Cawnpore against Ganeshi Lal upon the following allegations The complainant stated that Ganeshi Lal had been put in charge as his *gumashta* of a branch shop at Gauriganj in the district of Sultanpur that contrary to his instructions Ganeshi Lal had kept the shop open and had realized some 1,500 and odd rupees which he had misappropriated instead of sending it to the head office at Cawnpore The Magistrate rejected the complaint, holding that he had no jurisdiction to entertain it The Sessions Judge however took a contrary view and sent the case back to the Magistrate The accused thereupon applied in revision to the High Court

Babu *Satya Chandra Mukerji* for the appellant

Mr *C Ross Alston* for the opposite party

KARAMAT HUSAIN J —In this case Nand Kishore lodged a complaint against Ganeshi Lal The substance of the complaint is as follows —The head office of the complainant is at Cawnpore A branch of the firm was opened at Gauriganj district Sultanpur in Sambat 1964 The accused was appointed a *gumashta* and his share was fixed at four annas in the rupee He worked till Sambat 1966 and was asked to come to Cawnpore The accused

Criminal Revision No 195 of 1912 from an order of Austin Kendall Sessions Judge of Cawnpore dated the 2nd February 1912

(1) (1896) I L R 19 All 111 (2) (1899) I L R, 26 Calc 746

(3) (1908) 5 A L J 533

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GANESHI LAL v. NAND KISHORE

seemed to have been guilty of criminal breach of trust. The complainant directed him to close the shop at Gaurigaj and not to reopen it until the complainant had gone there and had checked the account. The complainant went to his home at Bhiwani in the Hissar district. When he returned in 1907, it came to his knowledge that the accused had opened the shop and misappropriated the money realized by him which he had to send to Cawnpore. A sum of about Rs. 1,583-14-6 has been misappropriated by him. When the complainant was examined he distinctly stated that the accused misappropriated the money belonging to the branch of the firm at Gaurigaj. The Magistrate to whom the complaint was made came to the conclusion that he had no jurisdiction inasmuch as the offence appeared to have been committed in Gaurigaj. In revision, the learned Judge was of opinion that the court at Cawnpore had jurisdiction. In his order he says:—"The facts alleged constitute an even stronger case for jurisdiction in the Cawnpore courts than did the facts in a previous case I. L. R., 19 All., 111 or I. L. R., 26 Calc., 746. Having regard to section 179 and to the above rulings in explanation thereof I find that the Magistrate had jurisdiction to proceed with the case." An application in revision is made to this Court, and it is urged on behalf of the applicant that the order of the Joint Magistrate is right. Section 179 of the Code of Criminal Procedure runs as follows:—"When a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has ensued, such offence may be inquired into or tried by a court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued." The word 'consequence' in this section, in my opinion means a consequence which forms a part and parcel of the offence. It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of the offence. In *Babu Lal* v. *Ghansham Das* (1) it is remarked:—"It is contended that section 179 by reason of the words contained in it 'and of any consequence which has ensued' gives the Magistrate at *Aligarh in this case jurisdiction. But the only reasonable* interpretation which can be put upon these words is that they are

(1) (1908) 5 A. L. J., 333

intended to embrace only such consequences as modify or complete the acts alleged to be an offence. The above remarks support the view I take. The loss to the principal firm at Cawnpore is therefore not a consequence of the act of the accused committed at the branch of the firm within the meaning of section 179, Criminal Procedure Code. In the case of *Colville v. Kristo Kishore Bose* (1) I find the following passage :—" He seems to have thrown out in the course of his judgement that he has no jurisdiction to take cognizance of the complaint because the offence, if any, was committed at Shalimar within the jurisdiction of the District Magistrate of Howrah. But it appears to us that the moneys having been received from the complainant's firm at Calcutta and the balance of accounts as stated by the complainant having been rendered in Calcutta, the Presidency Magistrate had jurisdiction to take cognizance of the complaint in question." The above facts are very different from the facts of the case before me and the case is no authority for the proposition that if an offence under section 408 is committed in a branch of a firm the courts at the head office of the firm will have jurisdiction. In the case of *Q. E. v. O'Brien* (2) the facts were also different, and the loss to a branch of the firm was not held to be a loss to the principal firm at another place. For the above reasons I hold that the courts at Cawnpore have no jurisdiction to proceed with the case, and set aside the order of the learned Sessions Judge. Let the record be returned.

Application allowed.

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GANESHI LAL v. NAND KISHORE

(1) (1899) I. L. R. 26 Calc. 746. (2) (1896) I. L. R. 19 All. 111.

1912
May 7

APPELLATE CIVIL

Before Mr Justice Karamat Husain and Mr Justice Tudball

AZIZ BAKHSH (OBJECTOR) *v* KANIZ FATIMA BIBI AND ANOTHER (DECREE HOLDERS)*

Civil Procedure Code (1908) order XXI rule 57—Execution of decree—Attachment—Application for execution dismissed but subsequently restored on review

By a mistake of the Court an application for execution against property which was under attachment was dismissed but the decree holder obtained a review of that order and the executing court was directed to proceed. There was no order removing the attachment. *Held* on application by the decree holder to sell the attached property that the attachment still subsisted and was valid as against a sale made by the judgement debtor previous to the review.

In this case the assignee of a simple money decree applied for attachment of two classes of property (1) property burdened with a mortgage in favour of the assignor, and (2) property not so mortgaged. The first court disallowed the judgement debtor's objection but upon appeal it was allowed by the High Court and the application was dismissed *in toto*. The decree holder however made an application for review and a modified decree was passed dismissing the application for execution in respect of the mortgaged property alone. During the pendency of the application for review the judgement debtor had transferred the property to a third person and the lower court after receipt of the first order had sent the record to the record room. After review the decree holder applied to the executing court to go on with the execution as to the non mortgaged property. The judgement debtor objected, but his objections were disallowed. The judgement debtor thereupon appealed to the High Court.

Mr *Nihal Chand* for the appellant.

Mr *B E O'Conor* and Maulvi *Ghulam Mujtaba* for the respondents.

KARAMAT HUSAIN and TUDBALL JJ —This is an appeal by a judgement debtor from an order passed in execution proceedings.

The person seeking to execute the decree is the assignee of a simple money decree which was transferred to the court of the Subordinate Judge of Meerut.

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* First Appeal No. [illegible] of 1912 from a decree of [illegible] Subordinate Judge of Meerut dated the [illegible] of November 1911

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AZIZ BAKHSH v. KANIZ FATIMA BIBI.

The assignee of the decree attached two lots of property, (1) property which was burdened with a mortgage in favour of her assignor, (2) property which was not so mortgaged. Both lots of property were attached. The judgement-debtor objected that the mortgaged property could not be sold in execution without a suit being brought on the mortgage.

The first court disallowed the objection. An appeal was preferred by the judgement-debtor to this Court, a Bench of which on the 2nd of June, 1909, upheld the objection and passed a decree dismissing the application for execution *in toto*. In this order there was clearly an error, as some of the property attached was not mortgaged property.

Accordingly, on the 10th of August, 1909, the decree-holder applied for review of the judgement of the 2nd of June, 1909. The application was granted, and this Court, on the 13th of June, 1910, passed a modified order dismissing the application for execution only in respect to the mortgaged property and remitting the record to the lower court with orders to continue with the execution of the decree according to law in regard to the rest of the property. In the meantime the lower court on receipt of the decree of the 2nd of June, 1909, had on the 18th of August, 1909, sent the record into the record room.

While the application for review was pending, *i.e.*, between the 10th of August, 1909, and the 13th of June, 1910, the judgement-debtor sold the non-mortgaged property to a third party.

After the decision of the 13th of June, 1910, the decree-holder applied to the lower court on the basis of this Court's order of that date to go on with the execution proceedings and to sell the attached (non-mortgaged) property. The judgement-debtor (not his transferee) objected, pleading that under order XXI, rule 57, the previous attachment had ceased to exist and that a fresh attachment was necessary and the property could not be sold as he had already sold it to another person.

The lower court rejected the objection, and hence this appeal by the judgement-debtor.

Stress is laid on order XXI, rule 57. The rule clearly does not apply. It relates to the case of a default by the decree-holder which prevents the court from continuing the execution proceed-

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Aziz Bakhsh v. Kaniz Fatima Bibi

ings and results in a dismissal of the application for execution by reason of that default In such a case the rule lays down that the attachment ceases to exist directly the order of dismissal is passed The rule allows the court on the occurrence of such default to either dismiss the application or adjourn the proceedings, and adds that if the application be dismissed the attachment ceases at once

In the present case there was no default nor after such a dismissal would the revival of the execution proceedings cause a revival of the attachment at least so as to prejudice the rights of strangers who have in the meantime acquired a title to the property (*vide* 14 C L J, 476) This latter case does not help the appellant who is himself the judgement debtor, nor is the case reported in 13 C L J 243 of any assistance, for in that case there was a clear specific order releasing the property from attachment Prior to the Code of Civil Procedure now in force there was often considerable doubt whether an attachment came to an end on the passing of an order dismissing an application for execution by reason of the decree holder's default (*vide* I L R 33 Calc 666) This has now been set at rest by order XXI, rule 57 But in the present case there was no such order of dismissal for default The first order of dismissal passed by this Court on appeal on the 2nd of June 1909, was set aside on review, and the order finally passed on the appeal only disallowed the application for execution in so far as it related to the mortgaged property, and upholding the application in regard to the property now in question and ordering the lower court to go on with the execution of the decree in respect thereto

In regard to this property there has therefore, been no dismissal of the application for execution. The lower court's order of the 18th of August 1909 consigning the record to the record room does not and cannot help the appellant He made the transfer while the application for review was pending We would point out that his transferee has not come into court

We hold that in the circumstances of this case the attachment of the property in question at no time came to an end, and we, therefore, dismiss the appeal with costs

Appeal dismissed.

Before Sir Henry Richards Knight Chief Justice and Mr Justice Banerji

1912 May 10

MUHAMMAD AKHTAR HUSAIN KHAN AND OTHERS (PLAINTIFFS) v TASADDUQ HUSAIN (DEFENDANT)

Partition—Appeal against preliminary decree—Final decree passed during pendency of appeal—Cross objections filed against final decree—Appeal against preliminary decree maintainable

Where the plaintiffs in a suit for partition had preferred an appeal from the preliminary decree and had also in the defendant's appeal from the final decree filed cross objections it was *held* that there was no bar to the hearing of the plaintiffs appeal against the preliminary decree *Kuriya Lal* v *Bishambhar Das* (1) and *Narain Das* v *Balgobind* (2) distinguished

This was an appeal under section 10 of the Letters Patent from a judgement of PIGGOTT J The facts of the case appear from the judgement under appeal which was as follows —

The question raised by this second appeal is a somewhat curious one In a suit for partition a preliminary decree was passed on the 19th of December 1907 On the 1st of February the plaintiffs in the suit preferred an appeal against the said decree They neglected however to ask the appellate court for any order staying proceedings in the court of first instance during the pendency of this appeal The result was that the appeal was still pending when on the 10th of March 1908 the first court proceeded to pass a final decree Against this decree the defendant appealed while the plaintiffs later on put in a memorandum of cross objections under order XLI rule 22 of the present Code of Civil Procedure In this petition the plaintiffs did not raise any of the points which they had taken in their memorandum of appeal against the preliminary decree but merely objected to certain matters which had been determined by the final decree alone I have just held in a connected appeal by the defendant that this appeal of the said defendant against the final decree was maintainable and have remanded that case to the lower appellate court for a decision both on the appeal and on the cross objections What I have now to decide is simply whether the plaintiffs appeal against the preliminary decree of the 19th December 1907 is maintainable in view of the fact that the plaintiffs have not appealed against the final decree passed on the 10th of March 1908 It is contended that the present case is distinguishable from that decided by this Court in I L R 32 All 225 because in the present case the appeal was filed before the final decree had been passed I find myself unable to draw any distinction of principle on this ground The reasons given in the above reported case for not entertaining an appeal against a preliminary decree unless the final decree is also challenged do not seem to me to be affected by the circumstance that there was no final decree in existence at the moment when the appeal against the preliminary decree was filed This view was taken by a Bench of this Court in F A No 3 of 1910 decided on the 21st of March 1911 I have pointed out that the plaintiffs could have protected themselves either by obtaining a stay order from the appellate court or by repeating in their memorandum

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* Appeal No 97 of 1911 under section 10 of the Letters Patent

(1) (1910) I L R 32 All 225 (2) (1911) 8 A L J, 604.

1912

MUHAMMAD AKHTAR HUSAIN KHAN v TASADDUQ HUSAIN

of cross objections the ground on which they had challenged the preliminary decree in the appeal against the same I een now it is open to the lower appellate court if it is satisfied that the plaintiffs have acted in good faith to admit a further memorandum of cross objections or to permit amendment of the memorandum already presented so as to meet the difficulty in which the plaintiffs find themselves The appeal now before me must in my opinion f l It is accordingly dismissed with costs

The plaintiffs appealed

The Hon'ble Dr *Sundar Lal* and Mr *S A Haidar*, for the appellants

Dr *Satish Chandra Banerji*, for the respondent

RICHARDS, C J —This appeal arises under the following circumstances The suit was one for partition A preliminary decree was made on the 19th of December 1907 The plaintiffs preferred an appeal within time against this preliminary decree Before the appeal was decided, however, a final decree was made on the 10th of March, 1908 The defendant preferred an appeal against the final decree, and the plaintiffs filed cross objections under order XLI rule 22 The two appeals then came before the lower appellate court It dismissed the plaintiffs appeal on the ground that they had not appealed from the final decree and it dismissed the defendants appeal upon the ground that he had not appealed against the preliminary decree Both parties appealed to this Court and our learned brother set aside the decree of the lower appellate court dismissing the defendant s appeal and remanding the case to be heard on its merits He however dismissed the plaintiffs appeal on the ground that they ought to have appealed against the final decree Reliance was placed upon the ruling of *Kuriya Mal* v *Bishambhar Das* (1) and also on the case of *Narain Das* v *Balgobind* (2) The facts in the present appeal are not identical with the facts in either of the two rulings relied on The final decree never became final The defendant had appealed against it and the plaintiffs had filed cross objections It was therefore *sub judice* when the appeal of the plaintiffs from the preliminary decree came on for hearing The case of *Kuriya Mal* v *Bishambhar Das* was like the present a case which arose before the present Code of Civil Procedure came into operation The case of *Narain Das* v *Balgobind* was one to which the provisions of the present Code were applicable The decision in the latter

(1) (1910) I L R 32 All 2?5 (2) (1911) 8 A L J 631

case seems to me to have rested entirely upon the ruling in *Kuriya Mal* v *Bishambhar Das* Section 97 of the Code of Civil Procedure provides as follows —

"Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree" It seems to me that this section shows that the proper mode of challenging the correctness of the preliminary decree is an appeal against that decree I can see no reason why a party should be called upon to appeal against the final decree and to incur the expense of so doing merely to keep the other appeal alive It may well be that the party has no objection to the final decree in itself and that his sole objection is to the preliminary decree In many cases the party would admit that if the preliminary decree is confirmed, the final decree is correct It seems to me also that the final decree depends upon the preliminary decree and that if an appeal is duly taken to the preliminary decree and succeeds the final decree necessarily falls with the reversal of the preliminary decree upon which it depends I would allow this appeal

BANERJI, J —I have also arrived at the same conclusion The ground upon which the appeal of the plaintiffs was dismissed by the lower appellate court was that they had not appealed from the final decree passed by the court of first instance That court overlooked the fact that at the time when the appeal of the plaintiffs came on for hearing there was pending in that court an appeal preferred by the defendant in which objections had been taken by the plaintiffs so that at the time of the hearing of the appeal of the plaintiffs from the preliminary decree, the final decree was *sub judice* and had not become final That circumstance distinguishes this case from the two rulings on which the learned Judge of this Court has relied and which have been referred to by the learned Chief Justice In the first of those cases no appeal had been preferred from the final decree and in the latter of them the period of appealing from that decree is said to have expired when the appeal from the preliminary decree was filed That is not the case here Therefore there was no reason for not entertaining the appeal preferred by the plaintiffs from the preliminary decree passed by the court of first instance I also would allow the appeal

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Muhammad Akhtar Husain Khan v. Tasadduq Husain

By the Court.—The order of the Court is that the decrees of the court below and of this Court are set aside and the case is remanded to the lower appellate court with directions to readmit it under its original number in the register and to hear and decide it on its merits. Costs here and heretofore will be the costs in the cause. The record may be sent back as soon as possible, to enable the lower appellate court to dispose of the appeals of both parties at an early date.

Appeal allowed.

FULL BENCH

1912
May 1911

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Karamat Husain and Mr. Justice Chamier.

DROPADI (Petitioner) v. HIRA LAL (Opposite party).*

Act No. III of 1907 (Provincial Insolvency Act), section 46 (4)—Appeal—Limitation—Application of general provisions of the law of limitation—Act No. IX of 1908 (Indian Limitation Act), sections 12, 29.

The Provincial Insolvency Act is a special law within the meaning of section 29 of the Indian Limitation Act, but inasmuch as it is not in itself a complete Code, there is nothing to prevent the application thereto of the general provisions of the Indian Limitation Act. Such general provisions do not "affect or alter the period prescribed by a special law," but only the manner in which that period is to be computed. *Jugal Kishore* v. *Gur Narain* (1) overruled. *Beni Prasad Kuari* v. *Dharaka Rai* (2), *Jot Sarup* v. *Ram Chandar Singh* (3) and *Veeramma* v. *Abbiah* (4) followed. *Poulson* v. *Madhoosoodun Paul Chowdhry* (5), *Unnoda Persaud Mookerjee* v. *Kristo Coomar Moitro* (6), *Nagendro Nath Mullick* v. *Mathura Mohun Parhi* (7), *Girija Nath Roy Bahadur* v. *Patani Bibee* (8), *Bihari Lal Mookerjee* v. *Mungolanath Mookerjee* (9), *Gopal Chand Naulucka* v. *Krishto Chunder Dass Biswas* (10), *Nijabu oola* v. *Wazir Ali* (11), *Khetter Mohun Chuckerbutty* v. *Dinabashy Shaha* (12), *Gurusiddharya* v. *The President of the Belgaum Town Municipalities* (13), *Kulasappa* v. *Lakshminathi* (14), *Abdul Hakim* v. *Latif-un-nessa Khatun* (15) and *Suraj Bali Prasad* v. *Thomas* (16) referred to.

The facts of this case appear sufficiently from the following order of reference made by Karamat Husain and Chamier, JJ.:—

The question for decision in this and the connected appeal is whether a person filing an appeal under section 46 of the Provincial Insolvency Act is entitled

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* First Appeal No. 1[illegible] of 1911 from an order of Austin Kendall, District Judge of Cawnpore, dated the 2[illegible]th of July 1911.

(1) (1911) I. L. R., 33 All., [illegible]8.
(2) (1[illegible]0[illegible]) I. L. R., [illegible]3 All., 2[illegible]7.
(3) Weekly [illegible], 190[illegible], p. 8[illegible].
(4) (1893) I. L. R., 18 Mad., [illegible]93.
(5) (18[illegible]5) 2 W. R., A[illegible] [illegible]
(6) (18[illegible]) 15 B. L. R., 60 note.
(7) (1891) I. L. R., 18 Calc., 3[illegible]8.
(8) (18[illegible]) I. L. R., 17 Cal., [illegible]
(9) (1879) I. L. R., 5 Calc., 110.
(10) (18[illegible]) I. L. R., 5 Cal., 314.
(11) (18[illegible]) I. L. R., 8 Calc., [illegible]10.
(12) (18[illegible]) I. L. R., 10 Cal., [illegible]5.
(13) (1[illegible]) I. L. R., 8 Bom., 5[illegible].
(14) (18[illegible]) I. L. R., 12 Mad., [illegible]7.
(15) (1903) I. L. R., 30 Calc., 632.
(16) (190[illegible]) I. L. R., [illegible] All., 4[illegible].

to the benefit of section 12 of the Limitation Act KNOX and PIGGOTT JJ in *Jugal Kishore* v *Gur Narain* (1) held that he is not In the course of their judgement they say that the only case on the point which they know of in this Court is that of *Beni Prasad Kuar* v *Dharaka Rai* (2) It is evident that their attention was not drawn to the case of *Suraj Bali Prasad* v *Thomas* (3) They distinguish the decision in I L R 23 All on the ground that it proceeds upon a *very special line of reasoning* It seems to us that it proceeds upon two grounds namely that section 5 of the Limitation Act does not *extend or alter* a period of limitation and that the Rent Act of 1881 could not be considered a complete Code in itself so as to render the provisions of the Limitation Act inapplicable

The first ground applies generally to all cases of this kind and was so understood by the learned judges who decided the case in I L R 28 All.

It seems to us that if the decisions in I L R 23 All and I L R 28 All. are right the decision in I L R 33 All must be wrong

Section 29 (1 (b) of the Limitation Act of 1908 reproduces section 6 of the Limitation Act of 1877 Therefore the construction placed upon section 6 of the Act of 1877 by the judges that decided the case in 23 All is not affected by the passing of the Limitation Act of 1908

We think that much confusion is likely to result from the conflict between the decision in 33 Allahabad and the earlier decisions in 23 and 28 Allahabad

We direct that this case be laid before the Hon ble the Chief Justice with a view to its being laid before a larger Bench

Mr *M L Agarwala*, for the appellant —

The time spent in obtaining copies of judgement and decree should be excluded in computing the period of limitation for the appeal The Indian Insolvency Act, it is true, provides for the *period of limitation of appeals but there is nothing to show that the* methods of computation of the period of limitation set out in part 3 of the Limitation Act were to be excluded in computing the period of limitation prescribed by that Act The rule set out in section 12 of the Limitation Act only lays down how the period of 30 days is to be calculated when some days had been spent in obtaining copies of judgement and decree An appeal under the Insolvency Act cannot be filed without a copy of the decree appealed against and in some cases it would be impossible to file the appeal at all within 30 days Section 29 of the Limitation Act provides that nothing in that Act would affect or alter any period of limitation prescribed by any special or local law The Indian Insolvency Act is certainly not a local law nor is it a special law In one sense all Acts of the Legislature deal with special subjects, and as such might be called special laws But the expression

(1) (1911) I L R. 33 All 7?8 (2) (1901) I L. R 23 All. 277,

(3) (1905) I L R. 28 All, 48

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'*special law*' means, what in England is known as a private Act of Parliament Moreover, by applying section 12 of the Limitation Act the period of limitation prescribed by the Insolvency Act would remain the same, but in calculating that period certain days would have to be excluded as provided for in that section which is based upon an obvious rule of justice and common sense He cited the following cases —*Suraj Bali Prasad* v *Thomas* (1), *Beni Prasad Kuari* v *Dharala Rai* (2) *Wall* v *Howard* (3), *Abdul Hakim* v *Latif un nessa Khatun* (4), *Khetter Mohun Chuckerbutty* v *Dinabashy Shaha* (5), *Nijabutoolla* v *Wazir Ali* (6), *In re Land Acquisition Act* (7) and *Guracharya* v. *The President of the Belgaum Town Municipalities* (8)

Munshi *Gulzari Lal*, for the respondent —

The Insolvency Act is certainly a special law inasmuch as it deals with the special subject of insolvency, and if this were not a special law, there was no Act in the statute book which would be special law According to the definition of special law as given in section 41 of the Indian Penal Code, the Insolvency Act is certainly a special law Moreover, the Insolvency Act by containing a provision for the period of limitation applicable to appeals was intended by the Legislature to be a self contained enactment

He cited *Kumara Akkappa Nayanim Bahadur* v *Sithala Naidu* (9) *Jugal Kishore* v *Gur Narain* (10) *Imal Kuari* v *Ablakh Rai* (11) *Girija Nath Roy Bahadur* v *Patani Bibee* (12) and *Nagendro Nath Mullick* v *Mathura Mohun Parhi* (13)

Mr *M L Agarwala* was heard in reply

RICHARDS C J and KARAMAT HUSAIN and CHAMIER JJ — One Ram Narain was declared to be insolvent by the Court of Small Causes Cawnpore and the respondent was appointed to be receiver of his estate On the application of the respondent, under section 37 of the Provincial Insolvency Act, certain transfers made by the insolvent in favour of the applicant were set aside by an order dated the 18th of March 1911 The applicant presented an appeal

(1) (190) I L R 28 All 48
(2) (1901) I L R 23 All 27
(3) (1896) I L R 18 All, 215
(4) (1903) I L R 30 Calc 832
( ) (18 4) I L R, 10 Calc, 265
(6) (1882) I L R 8 Calc 910
(7) (1906) I L R, 30 Bom, 275
(8) (1884) I L R 8 Bom, 529
(9) (1897) I L R 20 Mad, 476
(10) (1911) I L R 33 All 738
(11) (1876) I L R, 1 All 251
(12) (1890) I L R 17 Cal, 263
(13) (1891) I L R 18 Calc 3

to the District Judge on the 26th of April, 1911 His appeal was within limitation only if he was entitled under section 12 of the Limitation Act to deduct the time spent by him in obtaining a copy of the order of the court of first instance The District Judge, following the decision of KNOX and PIGGOTT, JJ, in *Jugal Kishore* v *Gur Narain* (1) held that the applicant was not entitled to the benefit of section 12 of the Limitation Act Accordingly he dismissed the appeal This is an application for revision of the order of the District Judge It has been treated by the office as a first appeal from an order, but it is an application under the proviso to section 46 (1) of the Provincial Insolvency Act

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In the course of their judgement in the case cited, KNOX and PIGGOTT, JJ say that the only case in this Court bearing on the point of which they are aware, is that of *Beni Prasad* v *Dharaka Rai* (2) (the actual reference is to a case reported at page 270 of the same volume but this was evidently a slip) They distinguished that case on the ground that it proceeded on a very special line of reasoning It seems to us that the decision of STRACHEY, C J and BANERJI, J, in I L R, 23 All, 277, proceeded upon two grounds, namely, that section 5 of the Limitation Act of 1877 did not within the meaning of section 6 of that Act affect or alter a period of limitation prescribed by the N W P Rent Act of 1881, and that the latter Act could not be considered a complete Code in itself so as to render the general provisions of the Limitation Act inapplicable KNOX and PIGGOTT, JJ, held that if section 12 of the Limitation Act were applied to an appeal under section 46 of the Insolvency Act, it would within the meaning of section 29 of the present Limitation Act "affect or alter" the period of limitation prescribed for an appeal under the Insolvency Act As the language of section 29 of the present Limitation Act is to all intents and purposes the same as that of section 6 of the Limitation Act of 1877, the decision of KNOX and PIGGOTT, JJ, conflicts with that of STRACHEY C J and BANERJI, J upon a question of the correct construction of the Limitation Act, which is of considerable importance It also conflicts with the decision of BANERJI J, in *Jot Surup* v *Ram Chandar Singh* (3) which was not brought to their notice

(1) (1911) I. L. R 33 All. 738 (2) (1901) I L R., 23 All 217
(3) Weekly Note 1902 p 84

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The question has been argued very fully before us, and our attention has been drawn to a large number of decisions bearing upon it. For the applicant it has been contended that the Provincial Insolvency Act is not a 'special law' within the meaning of section 29 of the Limitation Act, and that even if it is a 'special law,' the application of section 12 of the Limitation Act to the appeal in this case does not, within the meaning of section 29 of that Act, '*affect or alter the period prescribed for an appeal under* section 46 of the Provincial Insolvency Act.

So far as we are aware, the expression 'special law' has not been defined by the Legislature, except in the Penal Code, and it is not permissible to use the definition in that Code as a guide to the meaning of that expression in the Limitation Act. It may be that the expression was intended to cover only laws like the Rent Act X of 1859, which was held by the Privy Council to be a complete Code in itself, but it seems more likely that the words were intended to be understood in their ordinary sense as meaning an Act dealing with a particular subject. Even so the expression is not free from difficulty. The Code of Civil Procedure is a general law (see L. R., 3 I. A. 7) though it purports to deal only with procedure. The Forfeited Property Act of 1859 is obviously a special law. But what of such an Act as the Transfer of Property Act? The Registration Act has been held to be a special law and we think rightly. The Provincial Insolvency Act, though it applies to a large part of British India, appears to us to be a special law as it creates a special jurisdiction and deals with a very special branch of the law. We are of opinion that the Provincial Insolvency Act is a special law within the meaning of section 29 of the Limitation Act.

We think the course of legislation on the subject throws some light upon the true meaning of section 29 of the present Limitation Act. Act XIV of 1859 section 3 provided that when by any law then or thereafter to be in force a shorter period of limitation than that prescribed by that Act was specially prescribed for the institution of a particular suit such shorter limitation should be applied notwithstanding that Act, and section 14 of that Act contained provisions similar to those contained in section 14 of the present Limitation Act. While the Act was in force a question arose whether a suit for rent under Act X of 1859 was governed by Act XIV or not. A Full Bench of the Calcutta High Court answered this

question in the negative see *Poulson* v *Modhoosoodun Paul Chowdhry* (1) and this decision was approved in a later case by their Lordships of the Privy Council, who said that the special legislation contained in Act X was of such a special kind that according to the well established rule for the construction of Statutes, it must be presumed that the Legislature did not intend by the general enactment in Act XIV to interfere with it They pointed out that Act X was intended to form a special and complete Code of Procedure with regard to the trial of questions relating to rent and the occupancy of land in the mufassil—*Unnoda Persaud Mookerjee* v *Kristo Coomar Moitro* (2) In accordance with that decision it was held by a Full Bench in *Nagendro Nath Mullick* v *Mathura Mohan Parhi* (3) that section 14 of the Limitation Act of 1877 did not apply to suits under Act X of 1859 See also *Girija Nath Roy Bahadur* v *Patani Bibee* (4)

Section 6 of the Limitation Act of 1871 provided as follows — "When by any law not mentioned in the schedule hereto annexed and now or hereafter to be in force a period of limitation differing from that prescribed by this Act is especially prescribed for any suits appeals or applications nothing herein contained shall affect such law This was replaced in 1877 by section 6 of the Limitation Act of that year, which provided as follows " When by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit appeal or application, nothing herein contained shall affect or alter the period so prescribed The alteration in the language is noticeable and suggests an intention to limit the operation of special or local laws to the periods prescribed by them and to re introduce the principle of section 3 of the Limitation Act of 1859 which limited the operation of other Acts to any shorter periods prescribed by them. This seems to have been the view taken in *Behari Loll Mookerjee* v *Mungolanath Mookerjee* (5) where section 12 of the Limitation Act of 1877 was held to cover an application for review of judgement in a case under the Bengal Rent Act of 1869 and in *Golap Chand Nowlukha* v *Krishto Chunder Dass Biswas* (6) where section 5 of the Limitation Act of 1877 was

(1) (1865) 2 W R Act X Rulings p 21
(2) (1872) 15 B L R 60 Note
(3) (1891) I L R 18 Calc 368
(4) (1889) I L R 17 Calc 263
(5) (1879) I L R 5 Calc 110
(6) (1879) I L R 5 Calc 314

held to apply to a suit under the Bengal Rent Act of 1869 Similarly in *Nijabutoolla* v *Wazir Ali* (1), and in *Khetter Mohun Chuckerbutty* v *Dinabashy Shaha* (2), it was held that sections 5 and 14 of the Limitation Act of 1877 applied to suits under section 77 of the Registration Act The last three decisions were approved and followed by the Bombay High Court in *Gurachariya* v *The President of the Belgaum Town Municipalities* (3) On the strength of three of the Calcutta decisions it was held in a reference under the Madras Forest Act of 1882 I L R, 10 Mad, 210 that section 5 of the Limitation Act of 1877 applied to an appeal under that Act and in *Kullayappa* v *Lakshmipathi* (4) that section 14 of the Limitation Act of 1877 applied to a suit under the Madras Rent Recovery Act, 1865

After examining the cases mentioned above and others MUTHUSAMI AYYAR J, in *Veeramma* v *Abbiah* (5) came to the conclusion that the general provisions of the Limitation Act of 1877 were applicable to suits and other proceedings under Acts prescribing special periods of limitation unless those Acts were complete Codes in themselves to which the general provisions of the Limitation Act could not be applied without incongruity This view was accepted by STRACHEY C J and BANERJI J in *Beni Prasad Kuari* v *Dharaka Rai* (6) and by BANERJI J in *Lochi Sarup* v *Ram Chandar Singh* (7) both cases under the N W P Rent Act, 1881

There is therefore authority for the proposition that the general provisions of the Limitation Act, 1877, are applicable to suits and other proceedings under other Acts which prescribe special periods of limitation but which are not intended to be complete Codes in themselves and that the words 'affect or alter in section 6 of the Limitation Act of 1877 relate only to the period prescribed and not to the way in which that period is to be computed The same words appear in section 29 of the present Limitation Act It cannot however, be said that this view has gone unchallenged. SHEPHARD J in the case reported in I L R 18 Mad 99 expressed the opinion that the application of the general

(1) (1882) I L R 8 Calc 910
(2) (1884) I L R 10 Calc 265
(3) (1884) I L R 8 Bom 529
(4) (1889) I L R 12 Mad 467
(5) (1893) I L R 18 Mad 99
(6) (1907) I L R 23 All. 277
(7) Weekly Notes 1902 p 34

provisions of the Limitation Act to periods of limitation prescribed by other Acts did alter or affect those periods and CHANDAVARKAR J in a land acquisition case in I L R 30 Bom, 275 said it was a moot question whether the general provisions of the Limitation Act could be applied in this way though he followed a previous decision of the Bombay High Court by which he considered himself bound

The question is one of considerable difficulty and it must be admitted that at first sight it is straining the words to hold that the application of the general provisions of the Limitation Act to periods of limitation prescribed by other Acts does not 'affect or alter those periods In one sense it certainly does But the construction accepted by STRACHEY C J, BANERJI, J, and MUTHUSAMI AYYAR J seems to us to be correct Apart from the history of this piece of legislation we find it difficult to believe that when the Legislature introduced as it has into several Acts, provisions giving a right of appeal and prescribing periods within which the right may be exercised, it intended as a general rule that those provisions should be applied without reference to the general provisions contained in the general Limitation Act In many if not most, cases the Code of Civil Procedure is made applicable with the result that an appellant must produce a copy of the order against which he is appealing It is reasonable to suppose that the Legislature intended to give him time to procure a copy of the order The general provisions of the Limitation Act are founded mainly upon equitable considerations which apply as much to periods of limitation prescribed by special Acts as to periods of limitation prescribed by the Limitation Act itself

Upon the question whether this or that Act is a complete Code in itself to which the Limitation Act should not be applied, there is considerable difference of opinion In some of the cases already cited the Calcutta High Court held that the general provisions of the Limitation Act 1877, were applicable to suits under the Registration Act But in *Veeramma* v *Abbiah* (1) three Judges held that they did not apply and that decision was followed in *Abdul Hakim* v *Latif-un nessa* (2) In *Suraj Bali Prasad* v *Thomas* (3) it was held that section 5 of the Limitation Act, 1877 did apply

(1) (1893) I L R, 18 Mad 99 (2) (1903) I L R 30 Calc 632

(3) (1905) I. L R 28 All 48

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to a suit under the Registration Act. It is unnecessary to express any opinion on this point, but the soundness of one of the reasons given for holding that the general provisions of the Limitation Act do not apply to suits under the Registration Act, namely, that a suit to compel registration of a document might be delayed for many years under section 7 of the Limitation Act of 1877 (section 6 of the present Act) is open to question, for that section applies only to suits the period of limitation for which is prescribed by the schedule. The same reason was given by KNOX and PIGGOTT JJ for holding that the general provisions of the Limitation Act did not apply to proceedings under the Insolvency Act.

There remains the question whether the Provincial Insolvency Act is a complete Code in itself. In our opinion it is not. In order to ascertain the procedure to be followed in original, appellate or revisional proceedings, one has to refer to the Code of Civil Procedure. It appears to us that the object of section 47 of the Act was to attract the provisions of the Code of Civil Procedure. There are several Acts, for example, the Succession Act, the Probate and Administration Act, and the Land Acquisition Act, which make the Code of Civil Procedure applicable to proceedings under the Act and give a right of appeal to the High Court, but do not prescribe any period of limitation for the appeal. It has always been assumed, probably rightly, that such appeals are appeals under the Code of Civil Procedure governed by what is now article 156 of Schedule I to the Limitation Act and by the general provisions of the Act also. Sub-section (4) of section 46 of the Provincial Insolvency Act does not seem to have been required, but whether it was required or not we do not think that it can have been inserted for the purpose of rendering the general provisions of the Limitation Act inapplicable.

For the above reasons we are of opinion that section 12 of the Limitation Act applied to the appeal presented by the present applicant to the District Judge. In this view the appeal was within time. We set aside the order of the District Judge and remit the case to him to be disposed of according to law. Costs in this Court to be costs in the cause.

Appeal allowed.

FULL BENCH

1912
May 11

Before Sir Henry Richards Knight, Chief Justice Mr Justice Banerji and Mr Justice Tudball

SHEO NARAIN (PLAINTIFF) v JANKI PRASAD AND OTHERS (DEFENDANTS) AND LACHMI NARAIN (PLAINTIFF) *

Hindu Law—Mitakshara—Partition—Whether grandmother entitled to share in the case of a partition between father and sons

Held that upon a partition between a father and his sons the grandmother that is the father s mother does not get a share in the case of a family governed by the Benares school of the Mitakshara law

Radha Kishen Man v *Bach haman* (1) followed *Sheo Dyal Tewaree* v *Judoo Nath Tewaree* (2) *Badri Roy* v *Bhugwat Narain Dobey* (3) and *Shibbo soondery Dabia* v *Bussoomutty Dabia* (4) distinguished

This was a suit for partition of family property brought by one Sheo Narain against his father and brother (by another wife), claiming ⅓rd share The mother and the grandmother and the son of the plaintiff were subsequently added as parties on objection taken by the defendant The defence among other defences was that the grandmother of the plaintiff was entitled to a share also The learned Subordinate Judge gave a share to the grandmother The plaintiff appealed The Bench before which the appeal came referred to a Full Bench the following question, namely, whether a grandmother in a *Mitakshara* family is entitled to a share on partition of ancestral property, which the grandsons seek to obtain

The Hon ble Dr *Sundar Lal* (with him Maulvi *Muhammad Ishaq*) for the appellant submitted that in Hindu Law, there are two classes of writers one represented by Yajnavalkya, who give a share to father's wives, and the other represented by Vyas who give a share to the mother (which includes a grandmother but not a stepmother) Yajnavalkya uses the word ' father s wives which cannot include a grandmother The share which is assigned to the mother is in lieu of maintenance There are others too who are entitled to maintenance, but no share is assigned to them Yajnavalkya in Chapter II verse 114 115 says that a father may separate his sons at his pleasure and

* First Appeal No 178 of 1910 from a decree of Mohan Lal Hukku Subordinate Judge of Cawnpore dated the 4th of March 1910

(1) (1883) I L R 3 All 118
(2) (1867) 9 W R C R, 61
(3) (1883) I L R 8 Calc 649
(4) (1882) I L R 7 Calc 191

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if he makes the allotments equal, his wives to whom no stridhan has been given, must be made partakers of equal portions This text clearly shows that the only persons who are entitled to a share at partition between father and sons are the father's wives. Yajnavalkya nowhere gives a share to the grandmother As a general rule in Hindu Law, females are not entitled to any share, but the text here directs that the mother should get the share and thus it makes an exception in favour of the mother The females only get in the absence of males The Mitakshara which is a commentary on Yajnavalkya also in Chapter I section II, *placitum* 19 says that father's wives are partakers of equal portions, but allots no share to the grandmother Viramitrodaya which is a commentary on the Mitakshara deals with partition in Chapter II part I, and in *placitum* 19, quotes Yajnavalkya Vyas and other writers and says in the end that the stepmother does not get a share and makes no mention of the grandmother Subodhini and Balam bhatta also do not assign any share to the grandmother The Madan Parijata gives a share to the mother but not to the grandmother Thus, it appears that so far as authorities of the Benares school are concerned none of them give a share to the grand mother There are authorities which gave a share to the grand mother but they are applicable to Bengal only As to case law the only case of Allahabad is that of *Radha Kishen Man* v *Bachhaman* (1) but no authorities have been discussed. The case of *Puddum Mookhee Dossee* v *Rayee Monee Dossee* (2) and *Rayee Monee Dossee* v *Puddum Mookhee Dossee* (3) are cases governed by Bengal law In *Sheo Dyal Tewaree* v *Judoo Nath Tewaree* (4) the point did not arise and is an *obiter dictum* The case of *Shibbosoondery Dabia* v *Bussoomutty Dabia* (5) and *Purna Chandra Chakravarti* v *Sarojini Debi* (6) are both cases from Bengal and only Bengal authorities have been discussed The case of *Badri Roy* v *Bhugwat Narain Dobey* (7) is apparently a Mitakshara case, but the decision is based on Bengal authorities

Pandit *Shiam Krishna Dar* (for Dr *Tej Bahadur Sapru* with him Pandit *Kailash Nath Kunzru)* for the respondents,

(1) (1880) I L R 3 All. 118
(2) (1869) 12 W R C R 409
(3) (1870) 13 W R. C R. 66
(4) (1868) 9 W R C R 61
(5) (1881) I L. R. 7 Calc 191
(6) (1904) I L R 31 Calc 1065
(7) (1882) I L R. 8 Calc 649

submitted that it was not a specific case of a grandmother claiming a share against a grandson but it was a case of a mother claiming against a son The eldest member of the family is the father and the grandmother claimed as mother of the father She was a member of the joint family in her own right She has certain rights such as that of maintenance There are some authorities which use the word mother and not father s wives Vishnu and Brihaspati use the word mother and so does Vyas who includes grandmother in the word mother In any case, the grandmother will take a share as mother of the father She may not get any share where the partition is between grandsons only but when one of the parties to the partition is the father, she comes in as mother of the father There are no texts which contradict Vyas, and assuming that there are these texts are to be reconciled, and the only way to do that is to give the grandmother a share He cited Mayne s Hindu Law 7th edition pp 650 and 544, Jolly s Hindu Law p 103, Ghose's Hindu Law, p 283, Golap Chandra Sarkar s Hindu Law pp 268 and 270 Even in Bengal an attempt was made to show that grandmother had no share In I L R, 31 Calc, p 1065, the arguments were based on the same principles as in the present case and the Judges on consideration of all texts held that the grandmother has a share He cited Mandlik s Hindu Law, p 44, Sir Francis Macnaghten s Hindu Law pp 28 30 and 52, and West and Buhler s Hindu Law pp 677 780

RICHARDS, C J and BANERJI and TUDBALL JJ—The question referred to the Full Bench is "whether on a partition between a father and his sons the grandmother that is, the mother of the father gets a share according to the Mitakshara as prevailing in these Provinces

This question has arisen in a suit brought by the plaintiff, Sheo Narain, against his father Janki Prasad and his brother Bisham bhar who are governed by the Benares school of the Mitakshara for partition of joint ancestral property and he claimed a third share His stepmother Musammat Ram Dei and Musammat Mana his paternal grandmother, that is the mother of his father Janki Prasad, were added as defendants Both of them claimed shares for themselves It was urged in the court below that the grandmother was not entitled to a share, but this contention was

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overruled As there is a conflict of authority on the point, it has been referred to us for determination. We may state that the plaintiff's father, Janki Prasad, is the only son of his father, Mangal Sen and has no brother or nephews so that this is not a case of partition between the sons and grandsons of Mangal Sen.

After hearing the arguments addressed to us and considering the authorities placed before us we are of opinion that the question referred to us must be answered in the negative

The Mitakshara in the Chapter I section II, §§ 8 and 9, lays down the rule for partition between the father and his sons in the lifetime of the father In section VII of the Chapter, is stated the rule as to partition between sons after the death of the father In the case of partition in the lifetime of the father, the text of Yajnyavalkya is this —

"If he (the father) makes the allotments equal, his wives, to whom no separate property has been given by the husband or the father in law, must be rendered partakers of like portions" (Mitakshara, Chapter I, Section II, §8)

The author of the Mitakshara expounds the above texts in these terms —

"When the father by his own choice makes all his sons partakers of equal portions, his wives to whom peculiar property had not been given by their husband or by their father in law must be made participant of shares equal to those of sons"

In both the text and the commentary there is no mention of the grandmother and the only female who is declared entitled to a share is the wife of the father The word in the original is *patni* i e, wife which can never mean the mother *of the father*

As to partition after the father's death, section VII, § 1, of the Mitakshara is as follows —

"When a distribution is made during the life of the father, the participation of his wives equally with his sons has been directed * * * The author now proceeds to declare their equal participation, when the separation takes place after the demise of the father Of heirs dividing after the death of the father let the mother also take an equal share [Yajnyavalkya, 123 (a)] The word used in this case is as is natural 'mother, the original being *mata*

It is thus manifest that Yajnavalkya and the author of the Mitakshara make a distinction between partition during the life time of the father and partition after his demise In the former case a share is allotted to the wife of the father, in the latter to the mother of the sons effecting the partition A text of Vyasa is quoted in the Virmitrodaya, the Vyavahara Mayukha the Saraswati Vilasa and other works to the following effect —' The father s sonless wives however shall be made equal sharers, as also the paternal grandmothers for they are declared to be equal to mothers And this text is relied upon as an authority for the allotment of a share to the grandmother It must be borne in in mind that Vyasa evidently refers to the case of a partition between sons after the demise of the father, when the *mother* of those effecting the partition gets a share, and declares that grandmothers being " equal to mothers are like the mother entitled to a share This text cannot apply to the case of partition in the father s life time when his wife (*patni*) gets a share Therefore, if in any case the grandmother would be given a share, it would be in the event of a partition between sons after the father s death On this point we express no opinion, as the case before us is not one of partition after the father's demise No other text has been cited to us, and we can find none which supports the contention that when in the father s lifetime a partition takes place between him and his sons the grandmother of the sons that is his own mother should be allotted a share The *Vyavastha Chandrika* by Shyama Charan Sarkar was referred to in a case decided by the Calcutta High Court to which we shall presently refer The learned author, on p 356 Volume II Part I, states the rule deducible from the authority of text writers in these terms —" When a paternal grandfather s estate is divided by grandsons the paternal grand mother is to have a share equal to that of a grandson and he cites the text of Vyasa referred to above and a passage in Strange s Hindu Law It is clear from the context and from the position of the above passsage as compared with what precedes that the learned author was referring to the case of partition among grandsons after the death of the father and not to the case of partition in the lifetime of the father We are therefore unable to hold upon the authority of the texts of sages and

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commentators that on a partition between the father and his sons the mother of the father gets a share The reason for the rule seems to be that the mother of the father should look to her own son for support and maintenance

The view which we have taken above was adopted by this Court in *Radha Kishen Man v Bachchaman* (1) The learned Judges gave no reasons for their opinion but assumed that the grandmother does not get a share

The contrary opinion was held by the Calcutta High Court in *Badri Roy v Bhugwat Narain Dobey* (2) The learned Judges apparently followed the ruling in *Shibbosoondery Dabia v Bussoomutty Dabia* (3) which was a case under the Dayabhaga law of the Bengal school, and not a case governed by the Mitakshara They also rely on the passage in the Vyavastha Chandrika which we have quoted above As we have already pointed out that passage does not support the view of the learned Judges We are therefore unable, with all deference to agree with them

No other case to which the Mitakshara law of the Benares school applies has been cited before us or referred to in the judgement of the court below except the case of *Sheo Dyal Tewaree v Judoo Nath Tewaree* (4) which was undoubtedly a *Mitakshara* case but all that the learned Judges say in it is that "the mother or grandmother as the case might be is entitled to a share, when sons or grandsons divided the family estate between themselves" This *dictum* is inapplicable to the present case which is not one of partition between sons and grandsons

For the reasons stated above, we are of opinion that upon a partition between the father and his sons the grandmother that is the father s mother does not get a share in the case of a family governed by the Benares school of the law *Mitakshara* This is our answer to the reference

(1) (1881) I L R 3 All 118

(2) (1883) I L R 8 Calc 649

(3) (1882) I L R 7 Calc 191

(4) (1867) 9 W R C R 61

PRIVY COUNCIL

P C
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May 10
June 18

MUHAMMAD MEHDI HASAN KHAN (DEFENDANT) v MANDIR DAS (PLAINTIFF)

and cross appeal : two appeals consolidated

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow]

Burden of proof—Suit on mortgage bond—Production by plaintiff of copy of bond on the ground of loss of the original—Defendant s admission of execution and production of original with payment of debt endorsed by agent of mortgagee—Rebuttal of defendant s evidence by plaintiff with false story—Act No I of 1872 *(Indian Evidence Act) section* 114

In a suit for money due on a mortgage bond the plaintiff produced only a copy of the document alleging in his plaint that it had been lost The defendant admitted its execution but alleged that the debt had been discharged and in support of his allegation he produced the original document containing the endorsement of the mortgagee through her agent of payment of the debt The Subordinate Judge relying on section 114 of the Evidence Act put the *onus* on the plaintiff who to account for the possession of the bond by the defendant set up a case supported by witnesses which both courts below held to be false The Subordinate Judge dismissed the suit The Judges of the Judicial Commissioner s court disbelieved the evidence on both sides set aside the presumption under section 114 of the Evidence Act and endeavoured to make out a case for the plaintiff based on a theory of their own

Held (reversing that decision) that the first court was right in holding that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of proving that the debt was still outstanding and that the appellate court should not have disregarded the presumption under section 114 in favour of a possibility ' based on surmise Suspicion though a ground for scrutiny could not be made the foundation of a decision

Two consolidated appeals from a judgement and decree (31st July, 1907) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (31st January, 1907) of the court of the Subordinate Judge of Bara Banki

The suit which gave rise to these appeals was instituted on the 16th February 1906, to recover from the defendant Rs 62 717 2 3 on the basis of a mortgage deed dated the 22nd December, 1898

The plaintiff in his plaint alleged that he was the nephew of one Kakhal Mal who died in 1895, that on his death Sukh Dei his widow, obtained and held possession of the property left by Kakhal Mal until her death on the 5th January 1903 and that on the 22nd December, 1898, the defendant borrowed Rs 30 000 from Sukh Dei, and to secure repayment executed

* *Present* :—Lord SHAW Sir JOHN EDGE and Mr AMEER ALI

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the mortgage deed in suit by which he hypothecated the la mentioned therein The plaintiff stated that the only paym by the defendant was one of Rs 2,700 towards interest, but t no further sum had been paid towards principal or interest, a according to the terms of the deed the sum sued for was d from the defendant to the plaintiff, who had obtained a certific under section 8 of Act VII of 1889 The plaintiff also stated paragraph 9 of his plaint that "the plaintiff did not get t original deed which is lost therefore a copy has been duly fil in the present suit"

The defendant filed two written statements in defence, in t first of which he admitted the payment of Rs 2,700 on account interest, and further pleaded that he paid the remaining sum Rs 39 200 due under the deed in suit to Sukh Dei on Agh Sudi 4th, Sambat 1959 (December 4th, 1902) and took back th original deed In the second written statement he submitte that the provision for enhanced payment of interest in the dee was in the nature of a penalty and should not be enforced.

Before the issues were finally settled the Subordinate Judg after argument made the following order —

The plaintiff Sri Mandir brought the present suit for the recovery of the money due under the said bond on the allegation that he was the heir of the deceased Musammat Sukh Dei The said bond was not produced by him It was stated in the plaint that it was missing The bond has been produced in court from the possession of the defendant It bears an endorsement pur porting to have been signed by Musammat Sukh Dei to the eff ct that the money due under it had been paid off It is not alleged on behalf of the plaintiff that the defendant either stole or got the bond stolen Taking the provisions of section 114 Act I of 1872, into consideration I am of opinion tha the *onus* lies on the plaintiff to prove that the bond has not been discharged.

The second issue will therefore stand thus —

Whether the money due under the mortgage bond in suit has not been paid off by the defendant?

And that was the only issue material on these appeals

The Subordinate Judge on the evidence dismissed the suit

An appeal by the plaintiff came before Mr E CHAMIER, Judi cial Commissioner, and Mr J SANDERS Additional Judicial Commissioner (the principal judgement being delivered by the latter) who were of opinion that the *onus* had been wrongly thrown on the plaintiff by the first court and they dealt with the case on the assumption that the *onus* of proving payment was on the

defendant They considered that there were circumstances which rendered the payment very unlikely, and though the plaintiff had adopted the reprehensible course of procuring false evidence which was worthless that did not make the case of the defendant more probable They did not believe the evidence of payment tendered by the defendant, whose omission to give evidence on his own behalf they held to be prejudicial to his case In the result they arrived at the conclusion that he had not proved the alleged payment of Rs 39,200, principal and interest of the bond in suit The decree of the Subordinate Judge was therefore reversed, and a decree for the unpaid amount made in favour of the plaintiff

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The defendant appealed to His Majesty in Council

The cross appeal by the plaintiff related only to the defendant's plea that the provision in the deed for compound interest at an enhanced rate in case of default was in the nature of a penalty and should not be enforced, a contention which was upheld by the appellate court, but which is immaterial to the present report

On this appeal, which was heard *ex parte*,—

Ross for the appellant contended that the appellate court was wrong in holding that the *onus* was on the appellant to prove the payment of the debt, and had also erred in finding on the evidence that he had failed to discharge that *onus* The *onus*, it was submitted, was clearly on the respondent to prove that no such payment as alleged by the defendant had been made, and that the mortgage deed was not returned The possession of the deed bearing the endorsement of payment in the handwriting of the mortgagee's agent was a strong point in the appellant's favour, and the suit had been rightly dismissed by the Subordinate Judge Reference was made to the Evidence Act (I of 1872), section 4, the definition of "may presume", section 34, and section 114 Even if the *onus* was on the appellant he had discharged it

1912, *June* 18*th* —The judgement of their Lordships was delivered by Mr AMEER ALI —

These are two consolidated appeals from a judgement and decree of the Judicial Commissioners of Oudh, dated the 31st of July, 1907 and arise out of a suit brought by the plaintiff in the court of the Subordinate Judge of Bara Banki on the basis of a mortgage-bond executed by the defendant, Chaudhri Mehdi Hasan, on the 22nd of December, 1898, in favour of

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one Sukh Dei, since deceased. It appears that Sukh Dei carried on in her life time a money lending business and that the plaintiff has obtained a succession certificate under Act VII of 1889 to collect the debts due to her estate The present action was launched on the 16th of February, 1906, for the recovery of over Rs 62 000 principal and interest by the sale of the mortgaged premises At the time of the institution of the suit the plaintiff produced only a copy of the document, alleging that the original had been lost The defendant in his answer admitted its execution but alleged that the debt was discharged In support of his allegation he produced the original document containing the endorsement of payment by Sukh Dei and her general agent, Bansidhar

In view of the presumption embodied in section 114 of the Indian Evidence Act (I of 1872), the Subordinate Judge was of opinion that the burden of establishing that the obligation created by the bond was still outstanding lay on the plaintiff Their Lordships consider this to be the real meaning of the issue framed by him on the 6th of September 1906, after argument The plaintiff accepted the *onus* and obtained an adjournment for the production of evidence in rebuttal of the presumption arising from the possession of the document by the defendant The hearing of the case was resumed in January 1907, and the plaintiff examined a number of witnesses to prove that the defendant had dishonestly obtained possession of the bond after Sukh Dei s death through the instrumentality of Bansidhar He also attempted to establish that Sukh Dei was not at Bara Banki on the date of the alleged payment The defendant then went into evidence regarding the fact of payment and the delivery of the document to his servants on his behalf The Subordinate Judge disbelieved the plaintiff's witnesses With regard to the defendant s evidence, he observed as follows —

I would have hesitated in believing the testimony of defendant s witnesses also had it not been corroborated by the facts that the bond bearing an endorsement of payment was filed from the defendant s custody and it was stated by plaintiff s own witnesses that the said endorsement was in the handwriting of Sukh Dei s general agent, Bansidhar

In the result the Subordinate Judge dismissed the suit with costs

From this decree the plaintiff appealed to the court of the Judicial Commissioner of Oudh The learned Judges who heard

the appeal were of opinion that at the trial the *onus* had been wrongly thrown on the plaintiff In this view the learned Judge who delivered the principal judgement proceeded to examine in the first instance the evidence produced by the defendant and came to the conclusion that it was not reliable He then considered the testimony of the plaintiff's witnesses and was of opinion that it was false As regards the fact that the document on which the suit was based was in the possession of the defendant and produced by him with the admitted endorsement of Sukh Dei s general agent, he held that it must have come into the defendant s hands by some dishonest means He accordingly reversed the decision of the first court and decreed the plaintiff's claim, and his learned colleague concurred in this judgement The defendant has appealed to His Majesty in Council and there is a cross appeal by the plaintiff on the question of interest disallowed by the learned Judges in the court below But he has not appeared either in support of the judgement in his favour or to argue his own appeal

Their Lordships after a careful consideration of the case have come to the conclusion that the judgement and decree of the Judicial Commissioners cannot be sustained

Assuming that any question of *onus* remained after the parties had gone into evidence, and that it lay on the defendant to establish the allegation of payment, he appears to have proved facts which strongly support the presumption of law arising from the possession of the bond.

He showed that the endorsement of payment on the document was in the handwriting of Bansidhar, who, it is admitted was the "recognised and general agent of Sukh Dei and held a power of attorney from her, and that it bore his signature The defendant also produced a letter of demand on behalf of Sukh Dei, dated some seventeen days before the date of the alleged payment, signed by Bansidhar He proved further that this Bansidhar used to give acquittances on Sukh Dei s behalf Matadin, who according to the plaintiff's own witnesses is the defendant s treasurer, states that he and two other fellow servants carried the money to Sukh Dei s house, and that she after payment signed the document in Hindi in his presence below the endorsement written by Bansidhar and returned it to him. There is not a

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trace of cross examination in the evidence of this witness with regard to the genuineness of Sukh Dei's signature That statement remains uncontradicted, for no attempt, so far as their Lordships can see, was made to recall the plaintiff's witnesses to say the alleged signature of Sukh Dei was not in her hand

To meet the case made by the defendant, the plaintiff produced three classes of testimony He attempted to show that the defendant was heavily involved in debt at or about the time of the alleged payment, and he wished the court to draw from this circumstance the inference that repayment was unlikely The Trial Judge very properly, in their Lordships opinion, observed that the fact of the defendant s indebtedness "in itself would not go to prove that he did not repay the debt in question ' And he referred to the evidence of one of the plaintiff's witnesses to show that the defendant was in funds in June, 1902, and repaid other debts

The real and substantial case put forward by the plaintiff was of a two fold character—first that the bond was dishonestly and fraudulently made over to the defendant by Bansidhar after Sukh Dei s death, and secondly, that Sukh Dei was not at Bara Banki on the date of the alleged payment It is to be remarked that, although a book was produced by a pujari, whom the Subordinate Judge calls 'a tutored and untruthful witness" to prove Sukh Dei s absence from Bara Banki no attempt was made by the plaintiff to produce her *mahajani* books of account regularly kept in the course of business

The Subordinate Judge disbelieved the story told by the plaintiff's witnesses and the appellate court agreed with him in holding that their testimony was worthless But it has built up a theory of its own based chiefly on surmises, regarding the manner in which the bond came into the possession of the defendant The gist of the appellate court s judgement is to be found in the following statements which also show how the learned Judges have looked at the case Referring to the testimony of the plaintiff's witnesses, they say —

Worthless as this evidence is it does not in any way make the defendant respondent s case more probable In the view that I have taken of the evidence of payment it is difficult to account for the possession of the bond on the part of the defendant yet there are documents on the record whence it may

be inferred that some person for his own ends laid his hands on the document soon after the death of Musammat Sukh Dei and that through him it came into possession of the defendant.

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And after referring to the disputes among Sukh Dei's relations after her death, they go on to say —

"The plaintiff's inability to account for its disappearance no doubt suggested to him the reprehensible course of procuring false evidence but when the question is considered whether the possession of the endorsed bond on the part of the defendant raises a presumption of payment due weight should be attached to the possibility during this state of confusion of some person purloining the bond or even of its being lost and afterwards found and coming into the defendant's possession

Their Lordships cannot help considering this mode of treating a case where two distinct and conflicting sets of facts are opposed to each other as unsatisfactory The plaintiff came into court with a definite story to account for the possession of the document by the defendant The learned Judges agree with the first court in holding that story to be false and yet they proceed to build up a case for the plaintiff on what they call a "possibility" As already observed, the defendant did not rest his case merely on the legal presumption which arose from the possession of the document, he produced positive testimony which received corroboration from that presumption, and he proved facts which made his statement probable The learned Judges having disbelieved the evidence on both sides, have set aside the presumption under section 114 of the Evidence Act, which only embodies the ordinary rule of law, by a possibility based on surmises Now, it is a settled principle that suspicion, though a ground for scrutiny, cannot be made the foundation of a decision and that is exactly what appears to have happened in this case

With reference to the conflicting views of the two courts in India regarding the question of *onus* in view of the presumption under section 114 of the Indian Evidence Act their Lordships are of opinion that the Subordinate Judge was right in holding that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of establishing the affirmative proposition that the debt was still outstanding, in other words, of showing that the bond came in defendant's possession by dishonest means and that the signatures to the endorsement were either forgeries or unauthorized.

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On the whole their Lordships are of opinion that the judgement and decree appealed against should be set aside and the plaintiff's suit dismissed with costs in all the courts And they will humbly advise His Majesty accordingly The plaintiff will pay the costs of these appeals

Appeal allowed

Solicitors for the appellant —*T L Wilson & Co*

J V W

APPELLATE CIVIL

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Before Mr Justice Karamat Husain and Mr Justice Tudball

BALMAKUND (DECREE HOLDER) v ASHFAQ HUSAIN (JUDGEMENT DEBTOR)*

Execution of decree—Assignment—Ex parte order passed subsequent to assignment—Power of court on application of assignee to reconsider such order

Pending an application for execution of a decree the decree-holder sold the decree The purchaser applied for execution but whilst his application was pending the former application of the original decree holder came on for hearing and it was decided *ex parte* that the decree was barred by limitation *Held* that this decision was no bar to the consideration of the application for execution filed by the assignee of the decree nor was the court hearing this application bound by the former *ex parte* finding

The facts of this case were as follows —

Jagannath Prasad obtained a decree against Ashfaq Husain He applied for its execution on the 17th of April 1911 The judgement-debtor objected that the executing court had no jurisdiction as the decree had been transferred to another court on a previous application and that the decree was barred by limitation The date fixed for hearing these objections was the 8th of June, 1911 In the meantime Jagannath had sold his decree to Balmakund on the 27th of April 1911 who applied on the 2nd of June 1911, for execution Upon this application the court ordered notices to issue under order XXI rule 16 and fixed the 24th of June, 1911, for hearing any objections On the 8th of June, 1911, the date fixed for hearing the objections to the application of the 17th of April, the decree holder, Jagannath did not appear, the objections of the judgement debtor were heard and allowed and the application for execution was dismissed

* Second Appeal No 47 of 1912 from a decree of Austin Kendall, District Judge of Cawnpore dated the 8th of January 1912 reversing a decree of Murari Lal Officiating Subordinate Judge of Cawnpore dated the 10th of November 1911

When the application of Balmakund came up for hearing on the 24th of June the judgement-debtor objected that the matter had already been disposed of by the order of 8th June, and the decree could no longer be executed The court overruled the objection and ordered execution to proceed This order was reversed by the District Judge on appeal The decree-holder appealed.

Dr *Tej Bahadur Sapru* for the appellant —

The order of the 8th of June is not binding upon Balmakund, as he was no party to the proceedings The original decree holder having assigned his decree had ceased at the date of that order, to have any interest in it At that date the real decree holder was Balmakund, and he had applied for execution before that date In making the order of the 8th of June the court overlooked this fact altogether That order should not have been passed while the application of the 2nd of June was pending decision

Mr *Abdul Raoof* (with him Mr *B E O'Conor* and Mr *Muhammad Ishaq Khan*) for the respondent —

The order of the 8th of June stands intact It has not been set aside by appeal, review or revision The executing court, which passed that order, could not set aside, alter or ignore it except by a formal review The order of that court granting Balmakund's application for execution is therefore illegal At the date of the order of the 8th of June the only person whom the Court could recognize as decree-holder was Jagannath The assignee Balmakund, had no *locus standi* then for up to that time the assignment had not been proved to and recognized by the Court The assignment could not *ipso facto*, wipe out the name of the original decree holder at once, it could take effect only when recognized by the Court in proper proceedings therefor The order of the 8th of June was, therefore, passed against the right decree holder, and is binding upon his assignee The assignee should have given notice of the assignment to the parties and obtained postponement I rely on the ruling in *Sinnu Pandaram* v *Santhoji Row* (1)

Dr *Tej Bahadur Sapru*, in reply —

Notice of the assignment could be given only through the Court and on the assignee's application dated the 2nd of June. Notices

(1) (1902) I L. R., 26 Mad 429

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were ordered by the Court to issue. The court by granting Balmakund's application for execution, must be deemed to have in effect, set aside or corrected its *ex parte* order of the 8th of June

KARAMAT HUSAIN and TUDBALL, JJ—In this case one Jagannath obtained a decree against Ashfaq Husain from the court of the Subordinate Judge of Cawnpore He made several applications for the transfer of that decree either to the court at Lucknow or that at Bareilly The decree-holder, on the 18th of April 1911, made an application for execution in the court of the Subordinate Judge of Cawnpore The 8th of June was fixed for the hearing of objections raised by the judgement debtor Before that date the decree holder assigned that decree to Balmakund on the 27th of April, 1911 Balmakund on the 2nd of June, 1911, made an application under order XXI rule 16, for the execution of that decree The munsarim on that very date made the following report — *This is an application under order XXI rules 11 and 16 of Act V of 1908 and an application in execution has been made on behalf of* Jagannath Prasad, decree-*holder and the* 8th of June, 1911, has been fixed for the *disposal* of the objections taken by the judgement-debtor This application has been presented by the purchaser of the decree' The order on this report is that this be entered in the register of miscellaneous cases and notices fixing the 24th of June, 1911, be issued to the opposite party The case be put up on the same date for disposal On the 8th of June 1911, the application setting out the objections raised by the judgement-debtor to the application of the original decree holder, Jagannath, dated the 18th of April 1911, was taken up The decree holder, Jagannath, was absent for the simple reason that he had parted with his interest in the decree in favour of the assignee Balmakund, who had no notice of that date The Court, after hearing the objections raised by the judgement-debtor, allowed those objections and held the decree to be barred by limitation. On the 10th of November, 1911, when the Court took up the application of the assignee, dated the 2nd of June 1911 for disposal objections were taken by the judgement debtor One of those objections was that the application for execution of the decree by the decree holder was rejected finally on the objection of the judgement debtor on the

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8th of June, 1911, and that, therefore, the decree could not now be executed Regarding this objection the learned Subordinate Judge remarked as follows — I am of opinion that when the decree holder had not appeared and his pleader did not proceed with the application it simply should have been rejected No trial and disposal of the objection was called for Anyhow, the objections were decided against a person who had no longer any interest in the decree, having sold it before, and the decision was not binding upon the person who was the rightful owner and was not before the court This disposes of the objection" An appeal was preferred to the learned District Judge, who allowed the appeal on the ground that the order of the Subordinate Judge dated the 8th of June, 1911, was a subsisting order, and that all the steps taken subsequently thereto were *ultra vires* The learned District Judge, in connection with that order, remarks —'The proceedings of the lower court may be called careless or may be called inconsistent But in my opinion they were perfectly legal, and the order of 8th June could not be ignored or set aside by the court itself in subsequent proceedings * * * On the facts it is clear that all subsequent proceedings were *ultra vires* and must be set aside' Taking this view of the order of 8th June 1911, the learned District Judge allowed the appeal A second appeal is preferred from the decree of the learned District Judge, and it is contended that the order of 8th June 1911, regard being had to the circumstances of the case is to be treated as in substance set aside by the learned Subordinate Judge The learned counsel for the other side argues that that order has in no way been set aside, and that, therefore, it ought to stand. There can be no doubt that the learned Subordinate Judge when he took up the case on the 8th of June, 1911, was in possession of the facts that the decree-holder had assigned the decree to Balmakund, that he had no subsisting interest in the decree, and that the assignee had no notice of the date fixed for the disposal of the objections taken by the judgement-debtor The order which he passed was, therefore quite illegal That being so we are of opinion that the learned Subordinate Judge, by his order, dated the 10th of November 1911, rectified the mistake committed by his predecessor on the 8th of June 1911, and his remark in respect of that order must be treated as virtually

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setting aside that order, which was an *ex parte* order, and we think that he had power to do so inasmuch as it is open to every court to correct such mistakes. Such being the case, the view taken by the learned District Judge is not correct. The result is that we allow the appeal, set aside the order of the learned District Judge, and send back the case to him for the decision of the appeal on its merits. The appellant will be entitled to his costs of this appeal.

Appeal allowed.

1912
May 11

REVISIONAL CRIMINAL

Before Mr. Justice Karamat Husain and Mr. Justice Tudball.

EMPEROR v. HARDWAR PAL.*

Act No. XLV of 1860 (Indian Penal Code), sections 182, 211—Sanction to prosecute—Criminal Procedure Code, section 195.

H made a report against several persons including one *S*, at a police station charging them with rioting and voluntarily causing hurt. The police made inquiry and sent up several persons for trial but not *S*. Some of these were convicted by the Magistrate but acquitted by the Sessions Judge. Thereupon *S* made a complaint to the Magistrate charging *H* with having made a false report in respect of himself to the police. The Magistrate took cognizance of the complaint.

Held that the Magistrate had no power to take cognizance of the complaint by reason of the absence of sanction.

The facts of this case were as follows:—

On the 23rd of March 1911 a report was made to the police by Hardwar Pal to the effect that several persons named therein, including one Sher Bahadur Singh, had committed the offence of rioting. The police instituted a case against some of the persons named but not against Sher Bahadur. The accused were tried and some of them convicted by a Magistrate. These latter appealed to the Sessions Judge, who acquitted them. Sher Bahadur then filed a complaint under the first portion of section 211 of the Indian Penal Code against Hardwar Pal, who objected that the case could not proceed without the sanction of either the Superintendent of Police or the Court. The Magistrate held that no sanction was necessary and issued process against the accused. Hardwar Pal then applied in revision to the High Court.

The application came on for hearing before KARAMAT HUSAIN, J., who referred it to a bench of two Judges.

* Criminal Revision No. 164 of 1912, from an order of Kamta Prasad, Magistrate, first class, of Basti, dated the 2nd of February 1912.

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The case was subsequently heard by KARAMAT HUSAIN and TUDBALL, JJ

Mr *C Ross Alston*, for the applicant —

The Magistrate was wrong in holding that no sanction was necessary If the offence were treated as that of making a false charge to the police it would fall under section 182 of the Indian Penal Code and the sanction of the Superintendent of Police would be necessary If however, the offence is to be taken as one falling under section 211, the sanction of the court before which the original case had come would be necessary

Babu *Piari Lal Banerji* (for Babu *Durga Charan Banerji*), for the opposite party —

The real question is whether there is in the present case any thing in law debarring a Magistrate from taking cognizance of the offence in respect of which the complaint was filed. It is quite clear that if the offence charged falls under any of the clauses of section 195 of the Criminal Procedure Code, sanction would be necessary As the complaint did not allege the commission of an offence under section 182 there was nothing to prevent the Magistrate from taking cognizance of the offence alleged, if it did not come within any of the clauses of section 195 If the facts alleged in the complaint constituted no offence other than an offence under section 182 of the Penal Code it might then have been contended that the mere mention of another section of the Code could not take the case out of the purview of clause (*a*) section 195 of the Criminal Procedure Code But the false report to the police did constitute an offence under the first part of section 211 of the Penal Code, though the case did not come into court

This Court has held that section 211 consists of two parts, the first contemplates a charge made to the police and the second a false charge preferred in court Therefore although a false charge made to the police constitutes an offence under section 182 of the Penal Code it is also an offence under the first part of section 211 of the same Code

He cited *Empress of India* v *Pitam Rai* (1), *Empress* v *Parahu* (2) *Queen Empress* v *Bisheshwar* (3) *Imperatrix* v *Jijibhai Govind* (4) *Queen Empress* v *Karim Buksh* (5),

(1) (1883) I L. R. 5 All 215
(2) (1883) I. L. R 5 All. 598
(3) (1894) I L R. 16 All. 124.
(4) (1896) I L. R. 22 Bom 596
(5) (1887) I. L. R. 14 Calc 633

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Karim Buksh v *Queen Empress* (1) and *Queen Empress* v *Nanjunda Rau* (2)

It is, therefore quite settled that the offence charged would fall under section 211 as the charge was not made in court, and as Sher Bahadur Singh was never sent up for trial the offence, though falling under section 211, was not one committed in or in relation to any proceeding in any court Section 195, clause (*b*) of the Criminal Procedure Code does not require sanction for all offences under section 211, but only requires sanction where an offence under section 211 is committed in or in relation to any proceeding in any court It does not require sanction when the offence is committed before the police, *Ashrof Ali* v *The Empress* (3) *Putiram Ruidas* v *Mahomed Kasem* (4), *Dharmadas Kawar* v *The Emperor* (5)

It may be said that case was sent up by the police as regards some of the persons named in the report and that therefore the report constituted an offence committed in relation to a proceeding in court, but Sher Bahadur Singh, the person named in the report had no connection whatever with any proceeding in any court The wrong committed against him was the making of a false report to the police and as far as he was concerned there was no proceeding in court The false report although it named several persons in one document, was really a report of distinct and several offences committed by different persons named in the report, and the matter must be looked at as if there were separate reports against each of the persons named One particular person had nothing in common with another person, and the making of the report to the police became an offence relating to a proceeding in court only *qua* the persons who were sent up for trial and not against Sher Bahadur Singh who was not so proceeded against

Mr *C Ross Alston*, in reply —

The argument in support of the Magistrate s order is based on certain rulings of doubtful validity which interpret section 211 of the Indian Penal Code in it is submitted a purely arbitrary manner That section does no more than separate minor false charges from serious false charges, punishing the latter more

(1) (1888) I L R 17 Calc 574
(2) (1897) I L R 20 Mad. 79
(3) (1879) I L R 5 Calc 281
(4) (1893) 3 C W N, 33
(5) (1908) 12 C W N 575

severely than the former. It does not purport to deal with the offence of making false reports to the police, but with false charges instituted in court, according as the offences "falsely charged" are minor or major offences. A false report to the police, which the complainant carries no further, is punishable under section 182. This is the view taken in Gour's Penal Code where it is said that section 182 was intended to apply to a report made to the police or to some officer other than a magistrate competent to hold an inquiry, whereas section 211 applies to a definite accusation preferred in a court of law. In I. L. R. 19 Bombay at page 725 Mr. Justice Ranade expressed the same view. See also I. L. R. 15 Allahabad page 336. The position in the Penal Code of section 211 also supports this view. The contention put forward if the rulings are correct, involves the following absurdity. For offences under sections 172 to 188 of the Indian Penal Code the sanction of the public servant concerned is necessary and for offences under sections 193 to 211, the sanction of the court concerned is necessary, but no sanction at all is necessary if the false report is to be punished under section 211, although the case concerns the making of a false report to the police. The argument advanced is undoubtedly the logical outcome of the rulings cited, for section 211 is not in clause (a) of section 195 of the Code of Criminal Procedure, and as regards Sher Bahadur if no proceedings *against him* were taken in court, no sanction under clause (b) could be applied for. If this is correct, is it not more probable that the rulings relied on are unsound than that the Legislature could have intended, in such a case, to make a sanction unnecessary either by the police authority or by the court. It might, however, be held that, as the original case did in fact come into court, the offence now charged 'related to' a proceeding in court. This would make it unnecessary to discuss the larger question, for clause (b) of section 195 of the Code of Criminal Procedure would then apply, and the sanction of the court which heard and dismissed the original case would be necessary before the case now pending could proceed.

KARAMAT HUSAIN and TUDBALL, JJ.—The facts out of which this application in revision has arisen are as follows:—

The applicant here went to a police station and made a report against several persons of whom Sher Bahadur Singh was one. He

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EMPEROR v. HARDWAR PAL

accused them of the offences of rioting and voluntarily causing hurt The police made inquiry and sent up several persons for trial, but not Sher Bahadur Singh

The Magistrate tried the accused and the trial ended in the conviction of some of them. These latter appealed to the Sessions Judge, who acquitted them

Thereupon Sher Bahadur Singh made a complaint to the Magistrate stating the above facts against the present applicant, and charging the latter with having made a false report in respect to himself to the police which, he said, constituted an offence under section 211 of the Indian Penal Code

Objection was taken that the Magistrate could not take cognizance of the complaint without sanction obtained, and the terms of section 195 of the Code of Criminal Procedure were invoked to support the argument The Magistrate has held that sanction is not necessary, hence the present application

The facts stated in the complaint clearly constitute an offence under section 182 of the Indian Penal Code i e the giving of false information to the police but it has been held by this High Court that they also constitute an offence under the first half of section 211 of the Indian Penal Code

The argument which found favour with the court below is as follows If the complaint had been made of an offence under section 182 of the Indian Penal Code on the facts of the present case the sanction of the police officer would have been necessary under section 195 (1) *(a)* Criminal Procedure Code, but that clause makes no mention of an offence punishable under section 211 of the Indian Penal Code, therefore as the complaint is laid under this latter section no sanction is necessary Section 195 (1) *(b)* relates only to proceedings in Court This may perhaps be the natural result of the decision that the making of a false report to the police where the case has not come into court constitutes an offence under section 211 of the Indian Penal Code as well as one under section 182 but it leads to this absurdity that in the case of the lesser offence under section 182 a sanction is a *sine qua non*, whereas in the case of the more serious offence under section 211 a sanction is not at all necessary It is unnecessary to set forth the reasons why the law lays down the necessity of a sanction in cases of the class mentioned in section 195 of the Code of Criminal Procedure It is

obvious that they operate in the cases of both sections 182 and 211 of the Indian Penal Code and it was never intended by the Legislature that complaint should be made in the circumstances of the present case without the sanction of the police officer concerned

The difficulty might be solved by holding that in taking cognizance in the present case of an offence under section 211, the Magistrate is also taking cognizance of an offence under section 182, which he is forbidden to do by the terms of section 195 of the Code of Criminal Procedure without the sanction of the police officer concerned. He is, therefore, doing what is forbidden by the Code, and his action is illegal and *ultra vires* The true solution may be as suggested by counsel for the applicant, that the Legislature never intended section 211 of the Indian Penal Code to apply to anything except charges preferred in court to a Magistrate, and enacted section 182 to cover such a case as the present However, there are the rulings of this Court and other High Courts on the subject, and as we are able in the circumstances of the present case to do justice without going behind those rulings, it is, therefore, unnecessary to discuss the point further In the present case, there were proceedings in court On the basis of the alleged false report the police made inquiry and sent up some of the accused for trial Assuming that Hardwar Pal falsely implicated Sher Bahadur Singh in his report, and that the offence he thereby committed was one under the first paragraph of section 211, still it is quite clear that this offence was one committed in relation to a proceeding in court It is obvious that there is considerable relation between the first report and the proceeding in court, for the latter is the result of the former The report led to the police inquiry and the latter to the proceeding in court The offence if it be one under section 211 committed in respect to Sher Bahadur Singh was committed in relation to the proceeding in court, and at least the sanction of the court would be necessary under section 195 (1) *(b)* The argument that there was a separate complaint made to the police against each of the persons named in the report is the mere splitting of a hair as well as of a report There was one report which led to a proceeding in court

Whichever view we take of the law, it is clear in the circumstances of this case that the Magistrate had no power to take cognizance of the complaint made by reason of the absence of sanction.

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EMPEROR v. HARDWAR PAL

We allow the application and quash the proceedings as the Magistrate s action is illegal

Application allowed

APPELLATE CIVIL

1912 May 14

Before Mr Justice Karamat Husain and Mr Justice Tudball

PIARI LAL AND OTHERS (PLAINTIFFS) v MAKHAN AND OTHERS (DEFENDANTS)*

Act No XVI of 1908 (Indian Registration Act) section 17 (2) (xi)—Mortgage—Receipt for mortgage money—Registration

A receipt for money due upon a mortgage was given in the following terms — The bond is returned No money remains due *Held* on suit for recovery of the mortgage debt that the receipt did not require to be registered and that the words ' no money remains due did not purport to extinguish the mortgage

This was a suit to recover money alleged to be due upon a mortgage by sale of the mortgage property In defence a receipt was produced in the following terms —" The bond is returned No money remains due" The court of first instance (Additional Subordinate Judge of Meerut) found that the receipt was not proved, nor the payment of the mortgage money, and decreed the plaintiffs claim. On appeal the Additional Judge held that the receipt was proved, and, reversing the decree of the court of first instance, dismissed the suit The plaintiffs appealed, their main contention being that the receipt was inadmissible inasmuch as it was not registered

Mr *Nihal Chand* and Munshi *Benode Bihari*, for the appellants

The Hon'ble Dr *Sundar Lal* and Pandit *Vishnu Ram Mehta*, for the respondents

KARAMAT HUSAIN and TUDBALL, JJ —This was a suit upon a mortgage One of the pleas in defence was payment of the entire sum due on it In support of that plea a receipt, dated Asadh Sudi 3rd, Sambat 1950 corresponding to 16th June, 1893, was produced. The court of first instance came to the conclusion that the receipt was not proved and that the payment was not proved It therefore, decreed the claim There was an appeal to

* Second Appeal No 760 of 1911 from a decree of C E Guiterman, Additional Judge of Meerut dated the 2nd June, 1911 reversing a decree of Muhammad Husain Additional Subordinate Judge of Meerut dated the 14th of November 1910

the lower appellate court, which found that the receipt was genuine, and reversed the decree of the first court The plaintiffs have preferred a second appeal to this Court and two points are pressed before us The first is that there is nothing in the receipt and in the oral evidence adduced by the defendants to establish that the receipt refers to the mortgage which is the basis of the suit The second is that the receipt purports to extinguish the right in the mortgaged property, and that as it is unregistered, it is inadmissible in evidence The receipt is to the following effect —"The bond is returned. No money remains due" The defendants adduced oral evidence to establish that on the day on which the receipt was executed the sum of Rs 275 was paid The lower appellate court has believed that evidence

Regarding the plea that the receipt does not show that the bond in dispute was paid up, we are of opinion that this is entirely a new point which was not raised either in the first court or in the court of first appeal, and as it raises a question of fact, we are not inclined to give the appellants an opportunity to have that point tried *de novo* at this stage of the litigation

On the second point, having regard to the cases *Dalip Singh* v *Durga Prasad* (1), *Imdad Husain* v *Tasadduk Husain* (2), *Jiwan Ali Beg* v *Basa Mal* (3), *Sri Ram* v *Kesri Mal* (4), *Fakir* v *Kholu* (5) and *Lakshman* v *Damodar* (6), and the express wording of section 17, clause (2), sub clause (xi), of the Indian Registration Act No XVI of 1908, we are of opinion that the receipt, though unregistered, so far as it relates to the payment of the entire sum of the money due on the mortgage on the date of the receipt, is admissible in evidence, and the words "no money remains due do not, in our opinion, purport to extinguish the mortgage That being so, the receipt does not require registration. The result is that the appeal fails and is dismissed with costs

Appeal dismissed

(1) (1877) I. L. R. 1 All. 442
(2) (1884) I. L. R., 6 All. 235
(3) (1886) I. L. R. 9 All. 108
(4) (1896) I. L. R., 18 All., 838
(5) (1882) I. L. R. 4 Bom 590
(6) (1900) I. L. R. 24 Bom. 609

1912
May 15

Before Mr Justice Karamat Husain and Mr Justice Tudball

MUKHTAR AHMAD (JUDGEMENT DEBTOR) v MUQARRAB HUSAIN (DECREE HOLDER) *

Civil Procedure Code (1908) section 47—Execution of decree—Interlocutory order—Appeal

The court executing a decree struck off the proceedings upon the ground of wilful default on the part of the decree holder in prosecuting his claim. Subsequently, however finding that the decree holder had not really been in default the court cancelled its former order, held that an attachment which was in existence at that time still subsisted and that execution should proceed. *Held* that this was not an order to which section 47 of the Code of Civil Procedure 1908 applied

Observations of BANERJEE J, in *Jogodishury Debea* v *Kailash Chundra Lahiry* (1) followed.

In this case property was attached on the 17th of July, 26th of July, 27th of July 28th of July, and 12th of August 1909 The decree holder along with his application filed an affidavit, dated the 15th of May, 1909 giving full particulars as required by order XXI, rule 66 After all these proceedings the judgement debtor objected to the execution of the decree His objection was disallowed and his appeal to the High Court was also dismissed When the record went back to the court below in September 1910, notice was issued to the judgement debtor under order XXI, rule 66, and the decree holder was directed to file an affidavit under the same rule But as no affidavit was filed by him the court, on the 11th of November 1910, struck off the case for default The order runs as follows — The decree holder notwithstanding two adjournments has failed to prosecute the proceedings The case therefore cannot be adjourned any more The proceedings are struck off The court however subsequently discovered that that order was a wrong order and that in fact there was no default of prosecution on the part of the decree holder It therefore, held that the former attachment subsisted and that no fresh attachment was necessary and it decided to go on with the execution proceedings The judgement debtor objected that a fresh attachment was necessary, but his objection was disallowed.

From this order the judgement-debtor appealed to the High Court

* First Appeal No 61 of 1912 from a decree of Keshab Deb Subordinate Judge of Moradabad dated the 4th November 1911.

(1) (1897) I. L. R. 24 Calc 725

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MUKHTAR AHMAD v. MUQARRAB HUSAIN

Maulvi *Muhammad Ishaq* for the appellant

Mr *B E O'Conor* and Mr *Abdul Raoof*, for the respondent.

KARAMAT HUSAIN and TUDBALL JJ —In this case property was attached on the 17th of July 26th of July, 27th of July, 28th of July, and 12th of August, 1909 The decree holder along with his application filed an affidavit, dated the 15th of May, 1909, giving full particulars as required by order XXI, rule 66 After all these proceedings the judgement-debtor objected to the execution of the decree His objection was disallowed and his appeal to the High Court was also dismissed When the record went back to the court below in September, 1910, notice was issued to the judgement-debtor under order XXI rule 66, and the decree holder was directed to file an affidavit under the same rule But as no affidavit was filed by him the court on the 11th of November 1910, struck off the case for default The order runs as follows —"The decree holder notwithstanding two adjournments has failed to prosecute the proceedings The case, therefore, cannot be adjourned any more The proceedings are struck off' The court however, subsequently discovered that that order was a wrong order, and that in fact there was no default of prosecution on the part of the decree holder It, therefore, held that the former attachment subsisted and that no fresh attachment was necessary, and it decided to go on with the execution proceedings The judgement debtor objected that a fresh attachment was necessary, but his objection was disallowed.

From that order disallowing the objection this appeal is preferred. A preliminary objection to the hearing of the appeal is taken by the learned counsel for the other side The substance of his contention is that this order is a mere interlocutory order and does not come within the purview of section 47 of the Code of Civil Procedure The words of section 47 are, no doubt, very wide, and if taken in their literal sense will cover every order of an interlocutory nature that may be passed in execution proceedings But that does not seem to have been the intention of the Legislature In our opinion the view taken by BANERJEE, J, in *Jogodishury Debea* v *Kailash Chundra Lahiry* (1) is a sound one On page 739 he remarked as follows —"It is not every order made in execution of a decree that comes within section 244,

(1) (1897) I L R. 24 Calc 725.

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If that were so, every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable, and far greater latitude would be given of appealing against orders in such proceedings than is allowed as against orders made in suits before decree—a thing which could hardly have been intended. See *Sreenath Roy* v *Radhanath Mookerjee* (1) and *Behary Lal Pundit* v *Kedar Nath Mullick* (2) An order in execution proceedings can come under section 244 only when it determines some question relating to the rights and liabilities of parties with reference to the relief granted by the decree, *not when, as in this case, it determines merely an incidental question as to whether the proceedings are to be conducted in a certain way* I may add that the language of section 244, which enacts that certain ' questions shall be determined by an order of the court executing the decree, and not by separate suit, clearly indicates that the questions contemplated by the section must be of a nature such that it is possible to suppose that but for the section they could have formed the subject of determination by a separate suit But a question of an incidental character can never come under that description, and an order determining such a question cannot therefore, be a decree as defined in section 2" We agree with this view, which applies very aptly to the circumstances of this case now before us The result is that we hold that no appeal lies from the order of the court below, and we dismiss the appeal with costs

Appeal dismissed

(1) (1883) I L. R. 9 Calc., 773 (2) (1891) I. L. R 18 Calc 469

MISCELLANEOUS CRIMINAL

1912
May 16

Before Mr Justice Karamat Husain and Mr Justice Tudball

JAGGU AHIR v MURLI SHUKUL.

Criminal Procedure Code sections 145 526—Transfer— Criminal case — Accused person

Held that the expression 'criminal case' as used in section 526 of the Code of Criminal Procedure includes a proceeding initiated under section 145 of the Code and that the High Court under section 526 has power to transfer such a proceeding from one court to another court subject to all the conditions under which a transfer can be made *Arumuga Tegundan* (1) *Lolit Mohan Moitra* v *Surja Kanta Acharjee* (2) and *Gurudas Nag* v *Gaganendra Nath Tagore* (3) *referred to* *In re Pandurang Govind Pujari* (4) dissented from

An accused person is one over whom a criminal court exercises jurisdiction *Queen Empress* v *Mutasaddi Lal* (5) followed

THE applicant applied for the transfer of a criminal proceeding instituted under section 145 of the Criminal Procedure Code On the application coming on for hearing before PIGGOTT, J, a preliminary objection was raised by the opposite party that the High Court had no power to transfer criminal proceedings under section 145 of the Criminal Procedure Code PIGGOTT, J, referred the point to a bench of two Judges The matter then came on before KARAMAT HUSAIN and TUDBALL, JJ

Pandit *Shiam Krishna Dar* (for Munshi *Binode Behari*) for the applicant —

This Court has power to transfer all cases pending in inferior criminal courts Section 526 is very wide and gives this Court power to transfer on sufficient grounds any '*criminal case*' It is not necessary that an offence should have been committed before the matter could be called a '*criminal case*' A criminal case is one which is tried by a criminal court The Bombay case proceeded upon the erroneous assumption that it was necessary to constitute a criminal case, that an offence should have been committed

Mr *M L Agarwala*, for the opposite party —

There is a material difference in the wording of the section conferring on District Magistrates power to transfer cases and of the section conferring such power on the High Court In section

Criminal Miscellaneous No 52 of 1912

(1) (1902) I L R 26 Mad. 188 (2) (1901) I L R 28 Calc., 709
(3) (1905) 2 C L J., 614. (4) (1900) I L R., 25 Bom., 179
(5) (1898) I L R., 21 All., 107

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JAGGU AHIR v. MURLI SHUKUL.

526 the words "*criminal case*" are used, whereas in section 528 the word '*case*' is used. It is obvious, therefore, that the Legislature intended to discriminate between a '*case*' and a '*criminal case*'. Every proceeding would, of course, be a *case*, but would not necessarily be a '*criminal case*'. The reason for the distinction is obvious. Proceedings under section 145 and cognate sections are proceedings taken to prevent the commission of offences, and the District Magistrate, as head of the district, is responsible for the maintenance of its peace. He as the person on the spot, is best able to decide whether the exigencies of public peace would allow of the delay involved in transfer proceedings. It could never have been the intention of the Legislature to allow such proceedings to be indefinitely postponed or delayed, while questions of academical importance were being discussed in this Court. The mischief which these proceedings were intended to prevent would be perpetrated during the time that the transfer proceedings remained pending.

Pandit *Shiam Krishna Dar* was heard in reply.

KARAMAT HUSAIN and TUDBALL, JJ.—The question referred to us is whether the High Court has jurisdiction under section 526 of the Code of Criminal Procedure or under the Letters Patent (especially by section 22) to transfer from the court of one Magistrate to the court of another Magistrate a proceeding under section 145 of the Code of Criminal Procedure. There is a conflict of authority on the point. In *In re Pandurang Govind Pujari* (1) it was held that the High Court had no power under section 526 of the Code to transfer a proceeding under section 145 of the Code from one court to another. The reason given is that such a proceeding is not a "criminal case" within the meaning of section 526, that a criminal case means a case arising out of and dealing with *some crime already committed* and does not include proceedings taken for the prevention of a crime. The Madras High Court in *Arumuga Tegundan* (2) dissented from the Bombay case. The learned Judges said:—"We have no doubt of our power to transfer this case both under section 526 of the Code of Criminal Procedure and clause 29 of the Letters Patent. If a case under section 145 of the Code of Criminal Procedure is not a 'criminal case,' it is difficult to conceive what it

(1) (1900) I. L. R. 25 Bom., 179. (2) (1902) I. L. R. 26 Mad. 188.

is With all respect we are unable to agree with the decision of the Bombay High Court in *In re Pandurang Govind Pujari*" In *Lolit Mohan Moitra* v *Surja Kanta Acharjee* (1) GHOSE J, held as follows —

"An investigation under section 145 of the Code of Criminal Procedure is an inquiry within the meaning of clause (a) of section 526 of that Code

'A Magistrate trying a case under section 145 is a criminal court within the meaning of the Code

'The expression 'criminal case in section 526 means a case over which a Criminal Court has jurisdiction '

It is doubtful whether the High Court has power under section 526 to transfer cases other than those in which a person is charged with an offence The High Court may under section 15 of the Charter Act transfer a case under section 145

TAYLOR J held as follows — 'The expressions 'case' and criminal case are not co extensive The phrase 'criminal case' is used in a limited sense and does not apply to every case cognizable by a Criminal Court It is doubtful whether the High Court has power under section 526 to transfer cases which do not relate to matters which may strictly be described as criminal as relating to a crime or offence under the law The power however, exists under section 29 of the Letters Patent wherein the phrase 'criminal case' appears to be used without the distinction which apparently exists in the Criminal Procedure Code in respect of cases tried by a Criminal Court as opposed to civil cases

In *Gurudas Nag* v *Gaganendra Nath Tagore* (2) RAMPINI and MOOKERJI JJ held that a proceeding under section 145 of the Code of Criminal Procedure was a criminal case and expressly dissented from in *In re Pandurang Govind Pujari* (3) Our answer to the question turns upon the meaning we give to the phrase 'criminal case in section 526 of the Code of Criminal Procedure There is nothing in the section to lead us to infer that the phrase means a "criminal case arising out of an offence which has already been committed Had that been the intention of the Legislature, it could have easily expressed it in apt words and would not have used an expression of a larger connotation.

(1) (1901) I. L. R. 28 Calc., 700 (2) (1905) 2 C L J 614

(3) (1900) I. L. R. 25 Bom., 179

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JAGGU AHIR v. MURLI SHUKUL.

We are of opinion that it includes proceedings taken under section 145 for the prevention of a crime

A Magistrate who conducts those proceedings does so as a criminal court under the provisions of the Code of Criminal Procedure, and it cannot be said that he performs the function of an executive officer

The expression 'criminal case in clause (8) of section 526 need not necessarily be taken to have been used in the narrow sense of a criminal case arising out of an offence already committed.

The High Court is the highest tribunal in these provinces, and one of its important functions is to supervise the work of all the Criminal Courts subordinate to it, and there is no reason why the Legislature should deem it fit to limit the power of the High Court to transfer only such "criminal cases as arise out of the offences already committed and for that purpose should use a phrase of a more general import Besides such a limitation can serve no useful purpose The contention of the learned counsel for the opposite party that the expression 'an accused person which occurs in section 526 of the Code indicates that the phrase 'criminal case refers only to such cases as arise out of the offences which have already been committed is without force That expression has been used in a larger sense i e the person over whom a Criminal Court exercises jurisdiction BANERJI J in *Queen Empress* v *Mutasaddi Lal* (1) said — The Code of Criminal Procedure contains no definition of an 'accused person' but it was held by the Bombay High Court in *Queen Empress* v *Mona Puna* (2) that the term accused means a person over whom a Magistrate or other (criminal) court is exercising jurisdiction The same view was taken by the Calcutta High Court in *Jogha Singh* v *Queen Empress* (3) I see no reason to put a different interpretation on the words 'an accused person in section 434

It was further urged that proceedings under sections 176, 488 and 491 of the Code of Criminal Procedure can hardly be called a criminal case notwithstanding the fact that they are conducted under the Code of Criminal Procedure and this shows that

(1) (1899) I. L. R. 21 All. 107 (2) (1892) I. L. 16 Bom. 661

(3) (1896) I. L. R. 23 Calc., 493

every proceeding held under the Code is not a "criminal case" In our opinion this contention is without substance. We are inclined to hold that in the absence of anything to the contrary every case over which a criminal court exercises jurisdiction under the Code is a 'criminal case' for the purposes of that Code

On a careful consideration of the wording of section 526 of the Code of Criminal Procedure, the policy of the law and the cases to which we have referred in this judgement, we hold that the expression "criminal case" in section 526 includes a proceeding initiated under section 145 of the Code, and that the High Court under section 526 has power to transfer it from one court to another court subject, of course, to all the conditions under which a transfer can be made

In this view of the case it is unnecessary to consider the effect of section 22 of the Letters Patent upon the power of the High Court to transfer a proceeding under section 145 of the Code of Criminal Procedure

With the above expression of opinion the case was again put up before PIGGOTT J, who passed the following order —

PIGGOTT, J —The Bench to which the question was referred has held that this Court has jurisdiction to make the order of transfer required. I have considered the question on its merits, and what chiefly impresses me is the absence of any answer to paragraph 10 of the applicant's affidavit in the explanation of the Deputy Magistrate I think a transfer will be in the interests of justice I accordingly transfer this case from the court of Munshi Nizam ud din Ahmad to that of the District Magistrate of Ballia The latter may either dispose of the case himself, or may exercise his own powers of transfer so as to refer it to the court of any other Magistrate of his district competent to dispose of the same, except Munshi Nizam ud-din Ahmad himself

Record returned

1912
May 17

APPELLATE CIVIL

Before Mr Justice Tudball and Mr Justice Chamier

ASGHAR HUSAIN (PLAINTIFF) v PAL AHIR AND OTHERS (DEFENDANTS)

Estoppel—Occupancy holding mortgaged to zamindar and sold in execution of a decree on the mortgage as a fixed rate holding—Ejectment of purchaser—Right of purchaser to recover possession—Possessory title

An occupancy holding was mortgaged to the zamindar as a fixed rate holding was sold as such in execution of a decree on the mortgage and purchased by a stranger who remained in possession thereof for some eleven years paying rent to the zamindar Subsequently the purchaser was dispossessed by the judgement debtor *Held* on suit by the purchaser to recover possession that the defendant was estopped from setting up the plea that the holding was an occupancy holding and that the defendant having no title at all the plaintiff was entitled to regain possession on the strength of his possessory title.

This was an appeal under section 10 of the Letters Patent against a judgement of RICHARDS, J The facts of the case sufficiently appear from the judgement under appeal which was as follows —

This appeal arises out of a suit for possession of immovable property The merits of the case seem to be with the plaintiff, who obtained a decree in both the courts below It appears that the defendants or their predecessor in title mortgaged the property now in suit. In the mortgage the property was described as being held as a fixed rate tenancy A suit was instituted on foot of the mortgage A decree was granted and the property was sold as a fixed rate tenancy The auction purchase took place on the 23rd of August 1897 and the sale was confirmed on the 2nd of November 1897 The plaintiff in his plaint alleges] all these facts and further that he was dispossessed by the defendants on the 17th of October 1908 The suit was instituted on the 21st of November 1908 Notwithstanding the description of the property in the mortgage] and in the decree as also at the time of the auction sale it now turns out that all along the property was held as an occupancy holding and not as a fixed rate tenancy The plaintiff comes into court having to admit that the holding is an occupancy holding The lower appellate court has held that the holding is an occupancy holding but that the defendants are estopped from setting up this defence In my opinion the defendants are entitled to succeed Section 9 of Act XII of 1881 provides that a right of occupancy shall not be transferable in execution of a decree The result is that the plaintiff has to come into court and ask for possession on the basis of an alleged sale of an interest in land which the law in the most express terms provides shall not be sold. A number of authorities have been cited. In the case of *Ashu Tosh Sikdar* v *Behari Lal Kirtania* (1) it was held that a sale in contravention of the terms of section 99 of the Transfer of Property Act is not a nullity but

Appeal No. 39 of 1911 under section 10 of the Letters Patent.

(1) (1907) I. L. R 35 Calc 61.

merely voidable In that case the property had been attached and sold on foot of a simple money decree there being at the time a subsisting mortgage against the property vested in the decree holder The appeal arose out of an application to set aside the sale and not as in the present case a suit to recover possession based on the sale. Furthermore the provisions of section 99 of the Transfer of Property Act are not altogether analogous to the provisions of section 9 of Act XII of 1881. In the case of *Madho Lal* v *Katwari* (1) it was held that in execution of a decree for enforcement of a hypothecation bond by sale of specific property an objection by the judgement debtor that the property is not transferable with reference to section 9 of the N W P Rent Act could not be entertained. This case also arose out of execution proceedings. In the present case the plaintiff has to come into court admitting that he is not in possession and that he is seeking possession of property which he has to admit was not transferable by the court In other words the plaintiff has to say himself the very thing which *it is claimed the defendants are estopped from* saying

I am asked to hold that the decrees of the courts below may be supported by virtue of section 9 of the Specific Relief Act The plaintiff it was said being in possession and being wrongfully dispossessed brought his suit within six months. I am afraid that this contention is not open to the plaintiff Even assuming that the plaintiff was dispossessed by the defendants otherwise than in due course of law if he had wished to recover possession on this ground he ought to have instituted the suit on this ground alone and not as he has done in the present case by bringing a suit for ejectment on title It has been clearly and distinctly held by a Full Bench of this Court in the case of *Lachman* v *Shambhu Narain* (2) that a plaintiff suing for possession on the basis of title cannot get a decree for possession under the first paragraph of section 9 of the Specific Relief Act. Although I feel bound to allow this appeal I do not think that the defendants are entitled to costs in any court I accordingly allow the appeal and setting aside the decrees of both the courts below dismiss the plaintiff's suit I direct that the parties shall abide their own costs in all courts

The plaintiff appealed.

Dr *Satish Chandra Banerji*, for the appellant —

The defendants, who are the mortgagors and, as such, were defendants to the suit on the mortgage, and who were judgement debtors to the decree in execution of which the plaintiff purchased the property in dispute, had full knowledge of all proceedings before and after execution and had full opportunity of raising the objection at several stages of those proceedings that the holding was an occupancy holding, and as such, non transferable Having failed to raise such objection at any time prior to the sale, it was not competent for them to resist the purchaser after the confirmation of the sale when, so far as the parties to the execution case

(1) Weekly Notes 1886 p 41. (2) (1910) I.L.R. 33 All., 174

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ASGHAR HUSAIN v. PAL AHIR.

were concerned, the title vested in the purchaser, *Dwarkanath Pal* v *Tarini Sankar Ray* (1) Moreover, the defendants having failed to come within six months of their dispossession their occupancy right was extinguished, and they had no right left to interfere with the possession of the plaintiff, *Dalip Rai* v *Deoki Rai* (2)

Mr *Muhammad Ishaq Khan*, for the respondents —

The principle of estoppel could not be invoked to defeat the plain provisions of a Statute There was an express provision of law that an occupancy holding could not be sold The fact that the defendants did not raise the point during the pendency of the suit and the execution proceedings could not operate as an estoppel, *Jagadbandhu Saha* v *Radha Krishna Pal* (3) *Abdul Aziz* v *Kanthu Mullik* (4) The defendants being in actual physical possession of the property, the plaintiff must establish his title before he could oust them The defendants were occupancy tenants and were wrongfully dispossessed They, however, got back possession before the expiry of 12 years They could not be ejected. Section 79 of the Agra Tenancy Act applied where the zamindar dispossessed his tenants It did not apply to the case of the dispossession of a tenant by an outsider

Dr *Satish Chandra Banerji* was not heard in reply

TUDBALL and CHAMIER, JJ —The facts of the case out of which this appeal has arisen are as follows The predecessors in title of the defendants respondents were occupancy tenants of a certain holding On the 4th of June, 1885 they mortgaged this holding *describing it as a fixed rate tenure* in favour of the *zamindar of the village* A suit was brought to enforce the mortgage in December 1895, and on the 27th of July, 1896, a decree for sale was passed. On the 23rd of August, 1897, the property was sold as a *fixed-rate tenure* and was purchased by the plaintiff, a stranger to that suit The judgement-debtors objected to the zamindar being allowed to bid at the sale On the 2nd of November 1897, a sale-certificate was granted to the plaintiff From that date up to the 16th of October, 1908 the plaintiff had been in possession of the holding, paying rent to the zamindar

(1) (1907) I L R 34 Calc 199
(2) (1899) I L R 21 All 204
(3) (1909) I L R 36 Calc 920
(4) (1910) I L R 38 Calc 512

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Asghar Husain v. Pal Amir.

On the latter date he was dispossessed by the defendants, who asserted that the land was their occupancy tenure Hence the present suit was brought by the plaintiffs to recover possession The court of first instance and the lower appellate court decreed the claim On second appeal to this Court the learned Judge before whom the case came dismissed the suit holding that, as a right of occupancy could not be sold in execution of a decree, the plaintiff acquired no title to the holding, and therefore he was not entitled to a decree in a suit for ejectment against the defendants Two points are pressed before us The first is that the judgement-debtors are estopped from saying that the tenure was an occupancy tenure and not a *fixed rate tenure*, and secondly, even though no title passed to the plaintiff by the auction sale still on the 16th of October 1908, the defendants had no title themselves and therefore the plaintiff is entitled to a decree for possession against them on the strength of his possessory title We think both these contentions are sound It is clear that the defendants as well as the zamindar gave out that the tenure was a fixed rate tenure that is one transferable in execution of a decree The judgement debtors in the mortgage suit raised no objection whatsoever either in the course of the suit or in execution proceedings on the ground that the tenure was not transferable under law The plaintiff acting on the belief that the tenure was a fixed rate tenure as stated by the parties to the mortgage deed and the mortgage suit purchased it We think that it does not lie in the mouth of the defendants to say now that the tenure was not a fixed rate tenure Furthermore it is quite clear that for about eleven years the defendants had been out of possession The plaintiff has held possession and has been accepted by the zamindar as a tenant and has paid rent for the holding Any right which the defendants had as tenants disappeared long ago and when on the 16th of October, 1908 they dispossessed the plaintiff the latter had at least a possessory title, while the defendants had no title whatsoever On the basis of his possessory title alone the plaintiff would be entitled to a decree We allow this appeal, set aside the judgement of the learned Judge of this Court, and restore the decree of the lower appellate court The plaintiff will have his costs throughout

Appeal allowed.

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GUPTESHWAR RAM v RATI KRISHNA RAM

forfeits the right of the co sharer against whom pre emption is sought We, however, can recognise no distinction in principle between the introduction of a stranger and the introduction of a person having an inferior right to the pre emptor If it were otherwise, pre emption as between co sharers could always be defeated if one co sharer having an equal right could be induced to join in the purchase

The question remains whether or not we should hold that the custom of pre emption has been proved to exist With regard to the litigation it shows this much that the right of pre emption has consistently been claimed. Unfortunately it would appear that the question was never tried out in any previous litigation in the way we think it ought to have been tried out, namely, by hearing and considering the evidence adduced by the parties pro and con. The cases were generally decided solely upon the actual words appearing in the wajib ul arz, and as we know, it very seldom happens that any two Judges take precisely the same view of the meaning of those words We, therefore, think that in the circumstances of the present case the reference to the previous litigation shows little more than that the right of pre emption has been from time to time claimed. In our opinion and on the authority of *Returaji Dubain* v *Pahlwan Bhagat* (1), the reference to the right of pre emption in these two wajib-ul arz raised a *primâ facie* case that a custom of pre-emption prevailed in the village It is said that the history of the village, as set forth in the *kaifiyat nizamat*, shows that no custom of pre-emption could ever have arisen, and this is sufficient to rebut the *primâ facie* case established by the plaintiffs Having carefully considered this document, we do not think that in the present case it does rebut the plaintiff's case The history of the village shows that the zamindari is a very old one So far as the *kaifiyat nizamat* goes, it does not show that there was ever a transfer or sale subsequent to the year 1833 There were auction purchases but in these cases the right of pre-emption would not be set up It is urged that the property came into the single possession of a Raja in 1220 Fasli. Even this is not very conclusive, because we find the next settlement was not made with the Raja, but apparently with the same family who were the proprietors

(1) (1911) I. L. R., 33 All., 193

before the Raja came in. It is, therefore probable that the Raja's interest was of a temporary character On the whole we think that the plaintiff established the existence of the custom of pre-emption he set up This being so the decree of the court below was correct We accordingly dismiss the appeal with costs

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GOPTESHWAR RAM v RATI KRISHNA RAM

Appeal dismissed

1912 May 23

Before Sir Henry Richards Knight Chief Justice and Mr Justice Tudball

MUHAMMAD YASIN (PLAINTIFF) v ILAHI BAKHSH and OTHERS (DEFENDANTS)

Land holder and tenant—Rights of tenants with respect to groves—Custom—Wajib-ul-arz—Construction of document— Malik'

The wajib ul arz of a village contained the following provision, as to grove land —"Persons who have planted a grove and who are in possession of a grove have the rights of an owner (*ikhtiyar malikana*) If any trees fall down, they can plant fresh trees without the permission of the zamindar * When the land becomes denuded of all trees the planter of the grove will have the first right to cultivate the land.

Held that these provisions implied a right of transfer in the possessor of grove land.

This was an appeal under section 10 of the Letters Patent from a judgement of BANERJI, J The facts of the case sufficiently appear from the judgement under appeal, which was as follows —

This was a suit for possession of certain trees existing on plots of land Nos 568 and 569 which are part of the waste land of the village The parties to the suit are co-sharers in the zamindari The plaintiff purchased the trees from one Jagaoli Lal under a sale deed dated the 20th of December 1900 He alleged that the trees belonged to the predecessors in title of his vendor that he was in possession by virtue of his purchase and that the defendants were wrongfully interfering with him and by virtue of an order of the criminal court had taken possession The defendants stated that the trees belonged to the zamindars and had been planted by them, that the plaintiff's vendor or his predecessor was never in possession and even if the trees were planted by Thakur Dayal the ancestor of the plaintiff he had left the village and the trees had lapsed to the zamindars It has been found by the lower appellate court that the trees in question were planted by Thakur Dayal, who was a member of a joint Hindu family that Jagaoli Lal was the last male member of the joint family that he was the owner of the trees that Thakur Dayal or the plaintiff's vendor did not abandon the village and that after the sale to the plaintiff the latter was in possession The learned Subordinate Judge has also found that Thakur Dayal was not a tenant by which he apparently means an agricultural tenant But he holds that as it has not been shown that Thakur Dayal had no right to sell the trees it must be presumed that he had such right Accordingly the lower appellate court affirmed the decree of the court of first instance

* Appeal No. 6 of 1912 under section 10 of the Letters Patent

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MUHAMMAD YASIN v ILAHI BAKHSH

decreeing the plaintiff's claim. It seems to me that for a proper determination of this suit it is necessary to ascertain certain facts which have not been found by either of the courts below It should be found whether Thakur Dayal was in possession adversely to the zamindars If he was not in adverse possession and planted the trees with the permission of the zamindars it should be ascertained under what conditions he was allowed to plant the trees If he planted the trees on the condition that he should have the right to enjoy the produce of the trees and should also be competent to sell them the plaintiff has acquired a valid title to the trees If on the other hand there was a restriction upon his right to transfer the sale to the plaintiff can have no effect There would still be the question whether by custom or otherwise a person planting trees with the permission of the zamindar has a right to sell the trees either to some of the zamindars or to strangers I accordingly refer the following issues to the lower appellate court under order XLI rule 25 of the Code of Civil Procedure (1) By what right did Thakur Dayal plant the trees in question and what was the nature of his possession of the trees? Was he in adverse possession of them? (2) Did Thakur Dayal plant the trees with the permission of the zamindars? (3) If he did so, what were the conditions if any under which he was permitted to plant the trees? (4) If no particular conditions were attached to his right of enjoying and selling them had he by custom or otherwise a right to sell the trees in question? The court will take such evidence relevant to the above issues as may be adduced by the parties On return of the findings ten days will be allowed for filing objections

On receipt of the findings, BANERJI J held on a construction of the wajib ul arz that the plaintiff had failed to establish a custom giving the holder of a grove a right to sell the grove as such, though he might sell the timber, and accordingly allowed the appeal

The plaintiff appealed

Babu *Piari Lal Banerji*, for the appellant —

The plaintiff as purchaser of the rights of the grove-holder was entitled to retain possession of the grove as such, as long as the grove retained its character If the original grove holder could not be dispossessed there was no reason to hold that his transferee could be dispossessed There is nothing in law to show that the right of a grove holder is a mere personal right The Tenancy Act which makes the interest of a non occupancy tenant non transferable does not apply to a grove holder This was decided in *Ismail Khan* v *Mithu Lal* (1) Moreover in the present case the wajib ul arz distinctly recorded the fact that grove holders had rights of ownership with respect to their

(1) (1912) 9 A L J 483

grove The word *malik* is most general and comprehensive, and as observed by their Lordships of the Privy Council, implies absolute ownership unless there is anything in the surrounding circumstances to qualify such meaning, *Surajman* v *Rabi Nath Ojha* (1)

Mr *Muhammad Ishaq Khan*, for the respondent

It is quite clear that full rights of ownership were not given to a grove holder If such rights were given, the wajib ul arz would not record the fact that a grove holder was not entitled to replant trees in case the trees fell down The whole language of the wajib ul arz clearly controls the opening sentence

Babu *Piari Lal Banerji*, was not heard in reply

RICHARDS C J and TUDBALL J —This appeal arises out of a suit in which the plaintiff claimed to recover possession of a grove The court of first instance and the lower appellate court decreed the plaintiff's claim On second appeal to this Court the decrees of the courts below were reversed and the plaintiff's suit dismissed. The facts are very simple and undisputed The grove was planted by one Thakur Dayal with the consent of the zamindars The plaintiff who is also a zamindar, purchased it from Jagaoli Lal, the representative of Thakur Dayal, on the 20th of December 1900 He has been ousted from possession by the other zamindars who have been put into possession evidently under section 145 of the Code of Criminal Procedure The wajib ul arz deals very fully with the rights of persons to plant groves It is notorious that in some places it is considered by the zamindars themselves very desirable to encourage the planting of groves The wajib ul arz in the present case shows that this was the case in the village in question It provides that persons who plant with the consent of the zamindars, or are in possession of groves, are to have the rights of a *malik* They can cut down and sell the trees on terms of paying one fourth of the value of the timber to the zamindars They are entitled to retain possession of the grove so long as it continues to have the characteristics of a grove They are entitled when a tree is cut down or falls down to replace it with another without even asking the consent of the zamindar Even after the trees have been cut down entirely they are to have the first right to become tenants of the land at a

(1) (1908) I. L. R. 30 All. 84

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rent payable to the zamindars From the above recital of the wajib-ul arz it would appear that the zamindars, on whose behalf the wajib-ul arz was prepared, made provision not only for the actual planters of the groves but for persons who had become possessed of them Furthermore, it is quite clear that long possession of the grove by persons other than zamindars was contemplated. Trees do not grow up in a day, and further the owner for the time being of the grove was entitled to renew it from time to time by planting fresh trees It is, therefore, quite clear that the person who planted a grove with the consent of the zamindars acquired substantial right of a lasting and valuable nature It is almost impossible to understand how in many cases the planter of a grove could enjoy to the full the benefits conferred upon him by the zamindars when he agreed to plant a grove unless he had a right to transfer it The wajib-ul arz contemplates enjoyment beyond an ordinary man's life It almost seems to follow from the terms of the wajib ul arz itself that the planter of the grove had a right of transfer *Primâ facie* every man has a right to dispose of any property he possesses whether it be a grove or anything else Of course it frequently happens that the Legislature for reasons of policy places restrictions on rights of transfer, for example, in the case of certain tenancies, it is expressly provided by act of the Legislature that the tenant shall have no power to transfer, and if the grove in question was part of or an appurtenance to, such a tenancy, it is clear that the tenant could not sell the trees We know of no law which prohibits a person who has acquired rights similar to those of Jagaoli Lal from transferring such rights Jagaoli Lal planted this grove and acquired all the rights and privileges mentioned in the wajib-ul arz. There certainly is no legislative enactment prohibiting such a transfer In the present case it is urged that there was a finding of the Court that there was no custom or evidence of a custom entitling a grove holder to sell In our opinion the wajib ul arz affords the strongest evidence that the grove-holder in the present case had an interest which he was entitled to transfer Reliance is placed on an unreported case, Letters Patent Appeal No 23 of 1909 In some respects the facts in that case were not altogether dissimilar to the facts in the present case, but it would appear from the judgement that there was this very

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MUHAMMAD YASIN v ILAHI BAKHSH.

important distinction. The wajib ul arz instead of stating that the planter of a grove was a malik of the grove, on the contrary, stated that the trees belonged to the zamindars The only entry in favour of the defendant was a note to the effect that the tenants also claimed the trees We think that this case is quite distinguishable from the case before us In our opinion the decree of the lower appellate court on the facts of the present case was correct and ought to be restored. We, accordingly, allow the appeal, set aside the decree of this Court, and restore the decree of the lower appellate court with costs of both hearings in this Court

Appeal allowed

FULL BENCH

1912
March 27

Before Sir Henry Richards Knight Chief Justice Mr Justice Banerji Mr Justice Tudball and Mr Justice Chamier

HORI LAL AND ANOTHER (DEFENDANTS) v MUNMAN KUNWAR AND OTHERS (PLAINTIFFS)

Hindu law—Joint Hindu family—Mortgage—Purchase of mortgaged property by managing members—Suit for sale against managing members alone—Parties—Civil Procedure Code (1908) *order XXXIV rule* 1

Where in a suit for sale on a mortgage the defendants mortgagors were the managing members of a joint Hindu family who in that capacity had purchased the mortgaged property it was *held* that the family was sufficiently represented by the managing members and that the suit would not fail by reason of the non joinder of the other members of the family

The following cases were referred to in the judgements delivered by the various members of the Bench,—

Kishan Prasad v *Har Narain Singh* (1) *Bhawani Prasad* v *Kallu* (2), *Debi Singh* v *Jia Ram* (3) *Ram Narain Lal* v *Bhawani Prasad* (4) *Sheik Ibrahim Tharagan* v *Rama Iyer* (5) *Kendall* v *Hamilton* (6) *Daulat Ram* v *Mehr Chand* (7) *Lala Surja Prasad* v *Gulab Chand* (8) *Ramasamayyan* v *Virasami Ayyar* (9) *Kunj Behari Lal* v *Kandh Prashad Narain Singh* (10)

* Second Appeal No 861 of 1911 from a decree of B J Dalal District Judge of Shahjahanpur dated the 31st of March 1911 reversing a decree of Gokul Prasad Subordinate Judge of Shahjahanpur dated the 31st of January 1911

(1) (1911) I. L. R. 33 All. 272
(2) (1895) I L. R 17 All., 537
(3) (1903) I. L. R., 25 All., 214
(4) (1891) I. L. R., 3 All 443
(5) (1911) 21 M L J., 503
(6) (1879) L. R., 4 App Cas 504
(7) (1887) I. L. R. 15 Calc. 70
(8) (1900) I L. R 27 Calc., 724.
(9) (1890) I. L. R., 21 Mad 222
(10) (1907) 6 C L J, 302

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rent payable to the zamindars From the above recital of the wajib ul arz it would appear that the zamindars, on whose behalf the wajib ul arz was prepared, made provision not only for the actual planters of the groves but for persons who had become possessed of them Furthermore, it is quite clear that long possession of the grove by persons other than zamindars was contemplated. Trees do not grow up in a day, and further the owner for the time being of the grove was entitled to renew it from time to time by planting fresh trees It is, therefore quite clear that the person who planted a grove with the consent of the zamindars acquired substantial right of a lasting and valuable nature It is almost impossible to understand how in many cases the planter of a grove could enjoy to the full the benefits conferred upon him by the zamindars when he agreed to plant a grove unless he had a right to transfer it The wajib-ul arz contemplates enjoyment beyond an ordinary man s life It almost seems to follow from the terms of the wajib ul arz itself that the planter of the grove had a right of transfer *Primâ facie* every man has a right to dispose of any property he possesses, whether it be a grove or anything else Of course it frequently happens that the Legislature for reasons of policy places restrictions on rights of transfer, for example, in the case of certain tenancies, it is expressly provided by act of the Legislature that the tenant shall have no power to transfer, and if the grove in question was part of, or an appurtenance to such a tenancy, it is clear that the tenant could not sell the trees We know of no law which prohibits a person who has acquired rights similar to those of Jagaoli Lal from transferring such rights Jagaoli Lal planted this grove and acquired all the rights and privileges mentioned in the wajib-ul arz There certainly is no legislative enactment prohibiting such a transfer In the present case it is urged that there was a finding of the Court that there was no custom or evidence of a custom entitling a grove holder to sell In our opinion the wajib ul arz affords the strongest evidence that the grove-holder in the present case had an interest which he was entitled to transfer Reliance is placed on an unreported case, Letters Patent Appeal No 23 of 1909 In some respects the facts in that case were not altogether dissimilar to the facts in the present case, but it would appear from the judgement that there was this very

important distinction. The wajib ul arz, instead of stating that the planter of a grove was a *malik* of the grove, on the contrary, stated that the trees belonged to the zamindars The only entry in favour of the defendant was a note to the effect that the tenants also claimed the trees We think that this case is quite distinguishable from the case before us In our opinion the decree of the lower appellate court on the facts of the present case was correct and ought to be restored. We, accordingly, allow the appeal, set aside the decree of this Court, and restore the decree of the lower appellate court with costs of both hearings in this Court

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Appeal allowed

FULL BENCH

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March 27

Before Sir Henry Richards Knight Chief Justice Mr Justice Banerji Mr Justice Tudball and Mr Justice Chamier

HORI LAL AND ANOTHER (DEFENDANTS) v MUNMAN KUNWAR AND OTHERS (PLAINTIFFS)

Hindu law—Joint Hindu family—Mortgage—Purchase of mortgaged property by managing members—Suit for sale against managing members alone—Parties—Civil Procedure Code (1908) *order XXXIV, rule* 1

Where in a suit for sale on a mortgage the defendants mortgagors were the managing members of a joint Hindu family who in that capacity had purchased the mortgaged property it was *held* that the family was sufficiently represented by the managing members and that the suit would not fail by reason of the non joinder of the other members of the family

The following cases were referred to in the judgements delivered by the various members of the Bench —

Kishan Prasad v *Har Narain Singh* (1) *Bhawani Prasad* v *Kallu* (2), *Debi Singh* v *Jia Ram* (3) *Ram Narain Lal* v *Bhawani Prasad* (4) *Sheik Ibrahim Tharagan* v *Rama Iyer* (5) *Kendall* v *Hamilton* (6) *Daulat Ram* v *Mehr Chand* (7) *Lala Surja Prasad* v *Gulab Chand* (8) *Ramasamayyan* v *Virasami Ayyar* (9) *Kunj Behari Lal* v *Kandh Prashad Narain Singh* (10),

* Second Appeal No 861 of 1911 from a decree of B J Dalal District Judge of Shahjahanpur dated the 31st of March, 1911 reversing a decree of Gokul Prasad Subordinate Judge of Shahjahanpur dated the 31st of January, 1911.

(1) (1911) I. L. R. 33 All. 272
(2) (1895) I L. R 17 All., 537
(3) (1903) I. L. R. 25 All 214
(4) (1881) I. L. R., 3 All 443
(5) (1911) 21 M L J., 503
(6) (1879) L. R., 4 App Cas 504
(7) (1887) I. L. R. 15 Calc. 70
(8) (1900) I L. R 27 Calc., 724.
(9) (1890) I. L. R., 21 Mad 222
(10) (1907) 6 C. L. J., 362

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Lutchmanen Chetty v. Siva Prakasa Modeliar (1) *Gan Savant Bal Savant v. Narain Dhond Saran* (2) *Vithu Dhondi v. Babaji* (3) *Ramakrishna Narayan Sindhe v. Vinayak Narayan Sancadkar* (4) *Chinna v. Suda* (5) *Arunachala Pillai v. Vithilinga Mudaliyar* (6) *Anandha Pillai v. Kolandavelu Pillai* (7) *Shamrathi Singh v. Kishan Prasad* (8) *Parshad Partap Narain Singh v. P[illegible] Narain Singh* (9) *Ramsebuk v. Ramlall Koondoo* (10), *Alagappa Chetti v. Vellian Chetti* (11) *Jasoda Kunwar v. Sheo Shankar Ram* (12), *Jogendro Deb Raikut v. Funindro Deb Raikut* (13) *Kashinath Chimnaji v. Chimnaji Sadashiv* (14) *Narain v. Mst. Gunwanti* (15) *Harihar Prasad v. Mathura Lal* (16) *Gordhan Lal v. Raja Ram* (17), and *Nathu Lal v. Lala* (18).

This was a suit for sale based on a mortgage dated the 14th of November, 1870, executed by one Nathi Singh in favour of Dharam Singh. Dharam Singh was the husband of the plaintiff respondent Munnan Kunwar. Nathi Singh was represented in the suit by his brother and two nephews. One Tilok Ram purchased the mortgaged property from the mortgagor on the 7th of January, 1889. The purchaser died leaving Hori Lal and Jagannath his sons behind him. In the suit the sons of Hori Lal and Jagannath—[illegible]—were [illegible] impleaded as defendants.

It was contended by the defendants that the suit was bad for [illegible] members of a joint Hindu family were necessary [illegible]. The suit was dismissed by the court of first instance [illegible] ground [illegible] for impleading the sons of Hori Lal and Jagannath. The lower appellate court found that Hori Lal and Jagannath were the managing members [illegible] other members, and [illegible] claim. The [illegible] Hori Lal and Jagannath who [illegible] the High Court [illegible]

transferr[illegible] (Munshi [illegible] Narain with him), acquired all [illegible]

arz There ce[illegible]

for the a[illegible] a transfer In tr[illegible]

It is one o[illegible] of the Cour[illegible]

an interest in th[illegible] titling a g[illegible]

[illegible] affords the [illegible] e had an[illegible] laced o[illegible] 909 [illegible] lissimil[illegible] the ju[illegible]

(1) (1899) I. L. R. [illegible]

(2) (1883) I. L. R. [illegible]

(3) (1903) I. L. R. 32 [illegible]

(4) (1910) 12 Bom. L. R. [illegible]

(5) (1910) 12 Bom. L. R. [illegible]

(6) (1882) I. L. R., 6 Mad [illegible]

(7) (189[illegible]) I. L. R. 23 Mad [illegible]

(8) (1907) I. L. R., 29 All 3[illegible]

(9) (1904) I. L. R., 26 All 5[illegible]

(10) [illegible]

(11) [illegible]

(12) [illegible]

(13) [illegible]

(14) [illegible] Bom. 477

(15) (1909) [illegible] Bom. [illegible]

(16) [illegible]

(17) [illegible]

(18) [illegible]

decree was passed against the father alone, it could not be executed Order XXXIV, rule 1, of the Code of Civil Procedure provides that all persons interested shall be joined—the only exception being laid down in the explanation The course of rulings here has been that if a decree was passed against one member of a family, it bound him alone, *Ramanand* v *Koleshar* (1) This case was followed in *Sundar Lal* v *Chittar Mal* (2) If the son were not made a party, he could not raise the plea of absence of family necessity, *Chandradeo Singh* v *Mata Prasad* (3) The principle that the manager represents the others is inconsistent with the principle of Hindu law that every son has an interest in the joint property, *Gendan Lal* v *Babu Ram* (4) *Nathi Mal* v *Lala* (5) The doctrine that the sons are parties to the suit through their fathers would mean denying to the sons their right of redemption. If they are not made parties to the suit, they cannot reopen it later, and if it is held that they are not necessary parties, their right as Hindu sons would be gone They need never be impleaded, *Bhawani Prasad* v *Kallu* (6), *Debi Singh* v *Jia Ram* (7), *Badri Prasad* v *Madan Lal* (8) A member of a joint family has no defined share, *Bal Gobind Das* v *Narain Lal* (9) *Gendan Lal* v *Babu Ram* (3)

[TUDBALL J —Referred to *Ramakrishna* v *Vinayak* (10)]

Munshi *Benode Bihari* for the respondents —

There was no defect of parties—the fathers sufficiently represented their sons He cited *Suraj Bansi Kuar* v *Sheo Prasad Singh* (11) *Vithu Dhondi* v *Babaji* (12), *Gan Savant Bal Savant* v *Narayan Dhond Savant* (13), *Lala Surja Prasad* v *Golab Chand* (14) *Bhawani Prasad* v *Kallu* (15), *Sheo Pershad*

(1) Weekly Notes 1887 p 217
(2) (1907) I L R 29 All 1
(3) (1909) I L R 31 All, 176
(4) (1912) 9 A L J 86
(5) (1912) 9 A L J 410
(6) (1895) I L R 17 All 537
(7) (1903) I L R 25 All 214
(8) (1893) I L R 15 All 75
(9) (1893) I L R 15 All 339
(10) (1910) 12 Bom. L R 219
(11) (1878) I L R 5 Calc. 148
(12) (1908) I L R 32 Bom. 375
(13) (1883) I L R 7 Bom.
(14) (1900) I L R 27 Calc.
(15) (1895) I L R 17 All 537

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Singh v *Sahib Lal* (1), *Lutchmanen Chetty* v *Siva Prokasa Modeliar* (2) and *Baldeo Sonar* v *Mobarak Ali Khan* (3) There was another set of cases providing that no guardian could be appointed of a minor in a joint Hindu family, *Gharib-ullah* v *Khalak Singh* (4), because the *karta* of the family was the guardian. As a consequence a son was naturally represented by his father In the case in 9 A L J R, 86, it was held that no decree could be passed, as the interests of the members could not be defined But in *Maharaj Singh* v *Balwant Singh* (5), which was affirmed by the Privy Council, it was held that a decree could be passed against the interests of the other brother Another case was *Balwant Singh* v *Rani Kishori* (6)

Munshi *Gobind Prasad*, in reply —

The case of *Kishan Pershad* v *Har Narayan* (7) did not apply That was not a case of defendants If the sons were made parties, they could plead that the debt was personal to the father or that it was not for legal necessity, but later they could impeach it only on the ground of immorality Cases occur where the interests of the father are adverse to those of his sons They are necessary parties under order XXXIV, rule 1 Can it be said they have no interest in the property? *Muhammad Muzamilullah Khan* v *Mithu Lal* (8)

RICHARDS, C J —This appeal arises out of a suit for sale on foot of a mortgage The mortgage was dated the 14th of November, 1870 The mortgagee was one Dharam Singh, husband of the plaintiff, and the mortgagor was one Naiti Singh Tilok Ram purchased the mortgaged property on the 7th of January, 1889, and the defendants Hori Lal and Jagannath, are the sons of Tilok Ram who is now dead They pleaded amongst other things that their four sons constituting with themselves a joint Hindu family, were not made parties to the suit This is the plea with which we are concerned in the present appeal Having regard to the respective dates of the mortgage and of the institution of the suit, the non joinder of parties if such there was, could not be cured by making the sons of Hori Lal and Jagannath parties because the

(1) (1893) I L R 20 Calc, 453
(2) (1899) I L R 26 Calc 349
(3) (1902) I L R 29 Calc 583
(4) (1903) I L R 25 All 407
(5) (1906) I L R 28 All, 508.
(6) (1898) I L R 20 All 267
(7) (1911) I L R 33 All [illegible]
(8) (1911) 8 A. L. J, 901

suit at the time their absence was pleaded was barred by limitation Order XXXIV rule 1, of the Code of Civil Procedure, provides as follows —

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'Subject to the provisions of this Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage'

It is contended that all the members of the joint family have an interest in the right of redemption, and that as they were not made parties originally and cannot now be added as parties, the suit should be dismissed

I do not think that the words in the rule "subject to the provisions of the Code can help the plaintiff It is true that the Code provides that no suit shall fail for want of parties, but this does not mean that the defendants cannot insist on having all the necessary parties before the court either by their being made parties when the suit was instituted or being afterwards added as parties I, therefore, think that unless in the circumstances of the present case Hori Lal and Jagannath can be said to represent their sons or in other words that the sons are really parties to the suit through Jagannath and Hori Lal, the suit should be dismissed. All the members of the joint Hindu family have beyond doubt an "interest' in this mortgaged property

It has been found by the court below that Hori Lal and Jagannath are the managers of the family, and that their names alone appear in the village record. I think that we should accept this finding, and my judgement presumes that Jagannath and Hori Lal are the managers of the joint Hindu family made up of themselves and their four sons I propose in the first instance to deal with the question apart from decided cases

Prior to the passing of Act V of 1908 (the present Code of Civil Procedure) the enactment dealing with parties to a suit relating to a mortgage was section 85 of the Transfer of Property Act That section is as follows —

"Subject to the provisions of the Code of Civil Procedure section 437, all persons having an interest in the property comprised *in a mortgage must be joined as parties to any suit under* this chapter relating to such mortgage, provided that the plaintiff has notice of such interest'

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The only change material in any way to the present questio is the dropping out of the words "Provided that the plaintiff h notice of such interest" in order XXXIV, rule 1 It must l remembered that neither section 85 of the Transfer of Proper Act nor order XXXIV, rule 1, was any departure from the w established practice of the courts. It was always neces ary th persons interested in the mortgaged property should be made parti to a suit relating to the mortgage If the mortgage de belonged to a number of persons they should all be parties so th the person paying off the mortgage might get a good dischar The persons to whom the property mortgaged belonged were entitl to be parties to enable them to defend the suit and have the amou due (if any) properly ascertained I do not think, therefore, th any greater importance should be attached to the absence of so of the members of the joint family, because their presence is n required by a rule of the Code of Civil Procedure instead of a w established rule of practice It seems to me that if it is intend by order XXXIV, rule 1 to provide that in a case like the prese all the members of a joint Hindu family must be defendants name and could not be represented by the manager, the la requires the plaintiff to do what in many cases must be a practic impossibility The members of a joint Hindu family are frequent very numerous, comprising often absent members and infants tender years Furthermore, during the course of the litigatio there would be in all probability frequent births of sons, an the array of defendants would never be strictly complete unle during the entire time the suit was running its course, every new born son was added as a defendant The plaintiff in many case would have no possible means of ascertaining the existence of th infant members of the family

It seems to me to be impossible to dispute the proposition th it is a general rule of Hindu law that the manager represents t family in all transactions with the outer world, provided the transactions are family matters Indeed if it were not so it difficult to understand how the affairs of the family cou be carried on. If this proposition is correct, I can see no go reason why, in a case like the present, the manager shou cease to represent the family when the family has to ins tute or defend a suit in a court of justice. Before suit, t

manager can pay and be paid the family debts and take and give a valid discharge for the same. In the present case, the property was purchased by Tilok Ram presumably with family funds. On his death, the names of his sons Hori Lal and Jagannath alone, were recorded. Every defence which can be put forward in the present suit, can properly and fairly be put forward by the managers. I am very far from saying that a plaintiff in a mortgage suit would be prudent in refraining from making as many members of the family as possible parties to the suit. On the contrary in all suits and particularly in suits in which the mortgage was made by a manager and there is any possible question of the mortgage not having been made for legal necessity or a family purpose the plaintiff would be wise to make all or as many members of the family as possible parties, so that they may be bound by the result of the suit. Furthermore, I am of opinion that in all such suits notwithstanding that the manager is a party, the court should not hesitate to add as a party any member of the family who applies to be made a party, so as to enable him to put forward any defence which he desires to make, including, of course, a defence challenging the mortgage as not having been made for family necessity and family purposes.

In the course of the argument a great mass of authority has been cited and it seems to me that the great weight of authority of the courts in India has been in favour of holding that a decree against a manager in a suit like the present is not void, but that on the contrary, the members of the family who were not parties to the suit are bound by the decree on the ground that they were sufficiently represented by the manager and that they can only re open the litigation by showing that the mortgage was not for family purposes. It seems to me inconsistent to hold that the family is represented by the manager when the question is raised after decree and that they are not so represented if the question is raised before decree. In *Bhawani Prasad* v. *Kallu* (1) it was, however, held that the sons who had not been made parties to a suit for sale on a mortgage brought against their father alone, could sue for and obtain a declaration that the property, being family property, could not be sold in execution of the decree against the father and that they could obtain this declaration upon the sole

(1) (1895) I. L. R., 17 All., 537

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ground that they had not been made parties to the mortgage suit. This was a Full Bench case and was the decision of four out of the five Judges who constituted the Bench BANERJI, J, dissented from the view taken by the rest of the Court The case was not unlike the present, the difference being that the question did not arise until after a decree had actually been obtained against the father, while in the present case the plea has been taken in the suit by the defendants who were parties, there was this further difference that there was no finding that the father was the manager of the family though in all probability he was The case seems to me to have been decided by the majority of the Court upon the express words of section 85 of the Transfer of Property Act, which was the provision of law then in force providing for the parties to a suit relating to a mortgage It does not seem to have been argued that the absent members of the family were or could be represented by their father as the manager The effect of the decision has to some extent been modified by the case of *Debi Singh* v *Jia Ram* (1) But it is nevertheless the decision of a Full Bench, and I think it ought to be followed and treated as binding upon this Court unless we see cogent reasons for not doing so Do such cogent reasons exist? I have already pointed out that section 85 of the Transfer of Property Act has been repealed and replaced by a rule of the Code of Civil Procedure It was evidently thought that a rule under the Code of Civil Procedure was a more fitting place for a provision relating entirely to a matter of procedure It may well be that the court might consider itself more strictly bound by the express words in a section in the Transfer of Property Act than by a rule of procedure I think the repeal of section 85 is some reason for holding that the ruling in *Bhawani Prasad* v *Kallu* should not be followed in this case I have also pointed out that no argument based on the manager being a party to the suit was put forward in the case It is very probable that the father against whom the decree for sale was made, was the managing member of the family but there was no finding to that effect and it is of course possible that he was not. I have also pointed out that the weight of authority in India has been to hold that, after decree at any rate the absent members of a family

(1) (1903) I. L. R., 25 All., 214

are bound by the decree against the manager, and the ruling in *Bhawani Prasad* v. *Kallu* has certainly not met with universal approval in the rest of the courts in India. EDGE, C. J., pointed out the importance of having all the parties interested in the property before the court so as to prevent further litigation. I agree that this is desirable, but as already mentioned this in many cases is impossible. If *Bhawani Prasad* v. *Kallu* is applied to cases where the manager is a party, each member of the family who was not made a party can re-open the whole litigation on that sole ground even though it may turn out in the end that the mortgage was binding on the whole family. This, it seems, was the very thing the learned Chief Justice wished to avoid. As a matter of fact, there have been many such cases. In *Kishan Prasad* v. *Har Narain Singh* (1) certain persons brought a suit to recover money. The defendants pleaded that the plaintiffs and certain other persons constituted a joint Hindu family and that the plaintiffs were not entitled to sue without joining as parties the other members of the family. The plaintiffs answered this plea by contending that they were managers and carried on the business, and therefore the other members of the family were not necessary parties, but that, if the defendant wanted to have them made parties, they were willing that they should be added. The court of first instance made the other members parties but at the time it did so, the suit was barred so far as the added parties were concerned. The question arose whether or not the suit was barred by limitation. It had to be admitted that if the added parties were necessary parties originally the making of them parties later on could not cure the defect by reason of limitation. The Subordinate Judge held that the absent members were not necessary parties and gave a decree. This court reversed the decree of the court of first instance, holding that it was necessary that all the members of the family should join in the suit. Their Lordships of the Privy Council reversed the decision of this Court and restored the decision of the court of first instance. It is true that in that case the suit was a suit on a contract and the persons who were originally plaintiffs were the parties to the contract, while the present case is a suit for sale on a mortgage executed by the vendor of the predecessor in title of the defendants. It seems to

(1) (1911) I. L. R., 33 All., 272.

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me, however, that there is no difference in principle in the two cases I feel certain that their Lordships of the Privy Council intended to hold, not merely that the actual parties to the contract could enforce it but also that the other members of the family would be bound by the decree and that such a decree could be enforced against the family property I think this decision of their Lordships is strong ground for not applying the ruling in *Bhawani Prasad* v *Kallu* to the circumstances and finding in the present case What seems to me to be in principle the same question as the question involved in the appeal has recently arisen in a different way The case was argued before this Bench. It was the case of *Madan Lal* v *Kishan Singh* (1) A father who was found to be the manager of the family brought a suit to realize a mortgage which admittedly belonged to the family He did not make his son a party The defendants pleaded the non joinder of the son The question was, whether the son was a necessary party The very same arguments were put forward as are put forward in this case The son was interested in the mortgage security and should therefore, it was urged under order XXXIV, rule 1, be made a party In such a case it seems to me impossible almost to argue that the father could not represent the son If no suit had been brought the father could have received the mortgage money and have given a good discharge to the persons paying the money

In my opinion, the manager of a joint Hindu family can represent the family in a case like the present and the other members need not be made parties and I would dismiss the appeal

BANERJI, J —The question to be determined in this appeal is whether the suit of the plaintiff, which is one for sale on a mortgage is liable to dismissal on the sole ground that the sons of the defendants Hori Lal and Jaggannath were not joined as defendants. The mortgage was made by Naiti Singh, who, subsequently to the mortgage, sold the mortgaged property to Tilok Ram, the deceased father of the aforesaid defendants The court of first instance found on the merits against the defendants but dismissed the suit on the ground that the sons of Hori Lal and Jagannath, who have an interest in the mortgaged property by reason of their being, with their fathers members of a joint family, were omitted from the suit The lower appellate court has found that Hori Lal and

(1) F A. No 91 of 1911 *Infra* p 572

Jagannath are managers of the joint family property belonging to them and their sons, and that they fully represent the interests of their sons It has accordingly decreed the claim. The finding that Hori Lal and Jagannath are managers of the joint family of which they and their sons are members is a finding of fact and must be accepted by us in second appeal We have, therefore, to consider whether in a mortgage suit all the persons having an interest in the mortgage security or in the right of redemption are in the case of a joint Hindu family, represented by the managers of the family

Order XXXIV, rule 1, of the Code of Civil Procedure, on which reliance is placed on behalf of the appellants, provides that "all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties" The requirements of this section are, in my opinion, fulfilled, if all such persons are represented, in the case of a joint Hindu family, by the managers of the family The powers of the manager in a joint Hindu family are well known. He represents the family in all business transactions he can enter into contracts in regard to matters relating to the family give discharges for debts due to the family, and pay debts due by the family When, therefore, in respect of the mortgage due to or by the joint family, he sues or is sued in his own name in his capacity as manager all the other members of the family being represented by him must be deemed to have sued or been sued through him If this view is correct, the omission to join in the array of parties members of the family other than the manager is not a defect in the frame of the suit, and it cannot be said that there has been a non joinder of parties All the persons interested are substantially parties to the suit through the manager This was ruled by their Lordships of the Privy Council in the recent case of *Kishan Prasad* v *Har Narain* (1) Their Lordships held that the managing members of a joint family business of money lending are entitled to maintain suits brought to enforce contracts made in the course of that business without joining in the suit with them either as plaintiffs or as defendants the other members of the family This decision of their Lordships seems to me to settle the point The case was, no doubt, that of a business contract, but the principle laid down applies

(1) (1911) I. L. R. 33 All., 272

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equally to a mortgage, and is applicable as well in the case of the defendant as in the case of the plaintiff. It has been held by all the High Courts that a decree obtained against the manager of a joint Hindu family binds the other members though they were not impleaded in the suit in which the decree was passed. The cases on the point have been referred to at length in the judgements of some of my learned colleagues, and I do not think any useful purpose will be served by repeating them. In *Ram Narain Lal* v. *Bhawani Prasad* (1) a Full Bench of this Court held that "when a member of a joint Hindu family is sued for a family debt, it may be assumed that he is sued for the same as the representative of the family, and when the decree in such a suit is substantially one in respect of the family debt and against the representative of the family, such decree may properly be executed against the family property." This case accepts the rule that the members of a joint family are represented by the manager in a suit brought against the latter alone in respect of a debt due by the joint family. This case was, it is true, decided before the passing of the Transfer of Property Act, but it has been repeatedly held that section 85 of that Act, which, with some modifications has been re-enacted in order XXXIV, rule 1, of the present Code of Civil Procedure only gave legislative effect to what had always been the law. It was, no doubt, held by the majority of the Court in *Bhawani* v. *Kallu* (2) that the omission of the son in a mortgage suit brought against the father entitled the son to bring a suit to repudiate the decree simply on the ground that he was not joined as a party to the mortgagee's suit. This view has not found favour with the other High Courts and seems to me to be opposed to the principle laid down by their Lordships of the Privy Council in *Kishan Prasad* v. *Har Narain Singh*. The latest case on the point decided by the Madras High Court is that of *Sheil Ibrahim Tharagan* v. *Rama Iyer* (3).

The ordinary rule undoubtedly is that all persons interested in a suit should be made parties to it. But in the case of a joint Hindu family this rule is complied with if the manager of the family is sued or sues and thus represents the other members of the family. What is required is that all persons whose interests are

(1) (1881) I. L. R. 3 All. 443. (2) (1895) I. L. R., 17 All., 537.

(3) (1911) 21 M. L. J., 608.

to be affected by the suit are sufficiently and substantially represented. In the case of a joint Hindu family all persons interested are represented in the suit by the manager and are substantially parties to it through the manager. I do not think that it is essential that the manager, when he brings his suit, should state in distinct terms that he is suing as manager, or that the plaintiff in a suit against the family should describe the defendant as the manager of the family. All that is essential is that the manager is in fact suing or is being sued as such in respect of a family debt. If it is denied that the person suing or sued is the manager, that fact must be proved. The question is merely one of procedure, and I do not think it affects the substantive law as to the representation of members of a joint Hindu family by the manager of the family. "Procedure," said Lord PENZANCE in the well known case of *Kendall v. Hamilton* (1) "is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating it is permitted to obstruct, and even extinguish legal rights, and is thus made to govern where it ought to subserve." In the present case the appellants have no defence to the suit on the merits, but they are seeking to defeat it on the ground of a defect in procedure. In my judgement there is no such defect, as the sons of the appellants are substantially parties through the appellants who have been found to be the managers of the joint family of which all of them are members. I would, therefore, dismiss the appeal.

TUDBALL, J.—The facts of this case are simple. One Naiti Singh mortgaged the property in suit on the 14th of November, 1870, to one Dharam Singh. On the 7th of January, 1889, Naiti Singh sold the property to Tilok Ram, the father of defendants 4 and 5, Hori Lal and Jagannath. The appeal has been argued on the assumption that Tilok Ram and his sons constituted a joint Hindu family and that the purchase was made out of joint family funds. The property thus purchased became the property of the joint family. It stood recorded in the name of Tilok Ram alone, who, one may presume, was the manager. Tilok Ram died and the names of Hori Lal and Jagannath were recorded in the Government records. Dharam Singh has died, and the present plaintiff, his widow and successor, has brought this suit for sale on the basis of the mortgage

(1) L. R. 4 App. Cas., 504.

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Tudball, J

To this suit she has made parties—

1 The heirs and representatives of Naiti Singh

2 Hori Lal and Jagannath.

The suit was brought at the extreme limit of time allowed by law

Among other defences, Hori Lal and Jagannath pleaded that they had sons who were joint with them and therefore interested in the mortgaged property, and that these sons were necessary parties under order XXXIV, rule 1 This objection was taken at the earliest possible date

On the merits the court of first instance found for the plaintiff, but it dismissed the suit on the ground that the sons of Hori Lal and Jagannath were necessary parties to the suit, and, not having been impleaded, the suit must fail I presume that if there had been time to do so, the court would, under order I, rule 10 have made these sons parties and proceeded to decide the suit If they had been thus made parties, however, at that stage the suit as against them would have been barred by time

The plaintiff appealed and urged that Hori Lal and Jagannath were the managers of the family, and fully represented the interests of their sons and that it was not necessary to implead the latter as the joint family was fully represented through the managing members

The lower appellate court held that these two defendants 4 and 5, were the managers of the joint family, and that, therefore, it was unnecessary to implead their sons, and decreed the suit Hori Lal and Jagannath appeal

Two points are taken —

(1) That the plaintiff has not proved that the appellants are not managing members

(2) That the sons of the appellants are necessary parties, and the suit must fail unless they are impleaded.

As regards the first point there is a clear finding by the lower appellate court, and there is no certificate that there is no evidence on record to support it. This plea, therefore, fails

In regard to the second point it is clear that all persons having an interest in the mortgage security or the right of redemption must be joined as parties, *vide* order XXXIV, rule 1, Civil Procedure Code The proper procedure, I take it, where such a person

has not been made a party, is for the Court to make him a party, and then the question of limitation, if it arises, may be decided

But the question to be decided in the present appeal is whether or not, as a matter of fact, the sons of the appellants are virtually parties to the suit through their representatives, the managing members of the family In other words —"Can the managing member of a joint Hindu family be sued as representing the whole family without making the other co-parceners parties in a suit for sale on a mortgage?

The question is one of some difficulty by reason of the conflict of opinion disclosed in the various decisions of the High Courts in India Order XXXIV rule 1, of the Code of Civil Procedure is a rule of procedure which was formerly embodied in the Transfer of Property Act section 85 The only differences are that the proviso of section 85 as to notice has been omitted, and the words "in the property comprised in the mortgage' have also been altered.

Unless there be some other law which operates in the case of a joint Hindu family, it is clear that the members thereof other than the manager would be necessary parties to a suit for sale on a mortgage In the case of *Bhawani Prasad* v *Kallu* (1) it was held by a majority of a Full Bench of this Court that where a mortgagee had obtained a decree on his mortgage against a father in a joint Hindu family without impleading the sons, the latter were entitled to a declaration that the decree holder was not entitled to sell in execution of his decree the interests of the sons, on the sole ground that they were not parties to the suit on the mortgage

In the course of his judgement in that case the learned Chief Justice remarked —'I have not yet heard any one suggest that the father in a joint Hindu family is *as such* a trustee, executor, or administrator, within the meaning of section 437 of the Civil Procedure Code, of his son, particularly if that son is alive and [illegible] *juris* Consequently we may dismiss from the con[illegible] case that Pemi in Bhawani Prasad s suit for sale of [illegible] the sons in the family property represented his [illegible] been treated by Bhawani Prasad or by the court [illegible] representing them for the purpose of section [illegible] IV of 1882'

(1) (1895) I L R, 17 All, [illegible]

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It will be noticed that there was no consideration in the above case of the position of the manager of a joint Hindu family and his power to represent the family in the course of any litigation in which it might be involved. In so far as the above ruling may have held that the sons were absolutely necessary parties to the suit against the father, the binding force of it has been considerably decreased by the Full Bench ruling in *Debi Singh* v. *Jia Ram* (1). In the latter suit, the decision in which has since, with perhaps one exception, been regularly followed in this High Court and in other High Courts as well, it was held that where the property had been actually sold, the sons could not succeed, in a suit to recover it, on the sole ground that they were not parties to the suit, but must base their suit on some ground which, under Hindu law would free them from their liability for the debt incurred by their father. The principle which is the basis of this ruling it seems to me, must apply whether the property has been sold or not, but, be that so or not, it is a clear instance of a case in which a person interested in the mortgaged property was held bound by the decree and sale thereon, even though he was not a party personally to the suit. In other words, it is a clear decision to the effect that the substantive law to which he was subject was not overridden by the rule of procedure which makes it necessary to bring on to the record all persons interested in the right of redemption or the mortgage security.

Now the general rule of Hindu Law is that a joint family is represented by its manager in all its transactions or concerns with the outer world, provided they are for family necessity (*vide* I. L. R., 32 Bom., 375). In certain circumstances the manager has power to mortgage or sell the family property.

"The manager is neither a partner nor a principal, nor an agent of the family but a sort of representative owner, his independent right being limited on all sides by the correlative rights of others, &c. (*vide* Cowell's Tagore Law Lectures, 1870, p. 105). Where the manager borrows money on promissory notes for the purpose of a joint family business or to meet a joint family necessity, the creditor can recover the money from all the members of the family, although they have not been parties to the notes. (*Vide* 11 C. W. N., 130 and 7 C. W. N., 725, and 34 Bom., 72.) Ole

(1) (1903) I. L. R. 25 All. 214.

of the duties of a manager is to get in the income and pay the debts of the family (See Bhattacharya's Law of the Joint Family, p 295)

He can give a valid discharge without the concurrence of the minor members of the family (I L R, 25 Mad, 26)

It is difficult to see, therefore why a manager, if he can represent the family in its transactions and concerns with the outer world, should not be also able to represent the family in its litigations in the courts

In *Daulat Ram* v *Mehr Chand* (1) the contention of the co parceners other than the manager was that as they had not been made parties to the suit against the manager, they were not affected by the decree and their shares had not passed by the sale in execution thereof In the original suit the decree had been obtained against the managing members who had mortgaged the whole estate to pay off the family debt Their Lordships of the Privy Council held that the other co parceners were bound by the decree and that the whole estate had passed The managers had clearly represented the family in the litigation

In *Lala Surja Prasad* v *Golab Chand* (2) the two learned Judges differed on this point GHOSE J, ruled that the share of the son in the ancestral estate was liable for the satisfaction of the decree notwithstanding the provisions of section 85 of the Transfer of Property Act, the father having incurred the debt in his representative capacity and as managing member of the family and the son having been substantially a party to the suit in which the said decree was passed through the representation of his father, that section 85 of the Transfer of Property Act laid down only a rule of procedure, and the words "all persons in the section could hardly have been intended to include a Mitakshara son in a suit where the father is sued in his representative capacity He dissented from the ruling in *Bhawani Prasad* v *Kallu* Since the above decision, section 85 of the Act has been repealed and the rule laid down therein is now a rule of procedure in the Code of Civil Procedure

HARINGTON J, differed and quoted the case of *Bhawani Prasad* v *Kallu* in support of his decision though pointing out that SHEPHARD, J, had dissented from it in *Ramasamayyan* v

(1) (1887) I. L. R. 15 Calc., 70. (2) (1900) I L R. 27 Calc 724.

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Virasami Ayyar (1), which was followed in I L R, 22 Mad, 207

It is unnecessary to set forth at length the arguments on which the learned Judges based their opinions In *Kunj Behari Lal* v *Kandh Pershad Narain Singh* (2) it was held that if a decree is passed against the manager of a joint Hindu family in respect of a liability properly incurred for the necessities of the family, the binding character of the decree upon the interests of the other members depends not upon their having or not having been parties to the suit, but on the authority of the manager to incur the liability See also the decision in *Lutchmanen Chetty* v *Siva Prokasa Modeliar* (3), where the rule of representation was upheld

In *Gan Savant Bal Savant* v *Narayan Dhond Savant* (4), it was pointed out that "a Hindu family is regarded as a corporation whose interests are naturally centered in the manager, the presumption being that the latter is acting for the family unless the contrary is shown, and that before the introduction of the Code of Civil Procedure, this was equally so with regard to litigation as to other transactions

I have already noted the rule of Hindu law as pointed out in *Vithu Dhondi* v *Babaji* (5) In *Ramkrishna Narain Sindhe* v *Vinayak Narain Siswadkar* (6) it was held that the rule of procedure laid down in section 85 of the Transfer of Property Act does not interfere with the rule of Hindu Law, that it is open to the manager in a Hindu family to represent the other members (subject to certain conditions) in a suit brought upon a mortgage against him In *Chimna* v *Sada* (7) the same rule was approved, dissent was expressed from the decision in *Bhawani Prasad* v *Kallu*, and SHEPHARD J s decision in *Ramasamayyan* v *Virasami Ayyar* (8) and the decision in *Debi Singh* v *Jia Ram* (9) were quoted with approval

In *Arunachala Pillai* v *Vythialinga Mudaliyar* (10) it was held that no member of an undivided Hindu family *(except the manager as such)* is entitled to bring a suit to establish a right

(1) (1898) I L R 21 Mad, 222
(2) (1907) 6 C L J 802
(3) (1899) I L R 26 Calc, 349
(4) (1893) I L R 7 Bom 467
(5) (1903) I L R 32 Bom 375
(6) (1910) 12 Bom L R 219
(7) (1910) 12 Bom L R 811
(8) (1911) I L R 21 Mad 222
(9) (1903) I L R, 25 All, 214
(10) (1883) I L R 6 Mad 27

belonging to the family without making the other members of the family parties to the suit

But in the case *Angamuthu Pillai* v *Kolandavelu Pillai* (1) it was held that the plaintiff could not sue without making his brother, the other member of the undivided family, a party to the suit, though he was suing as the manager to recover certain property for the family The latest decision of the Madras High Court is to be found in *Sheik Ibrahim Tharagan* v *Rama Iyer &c* (2), in which, after an exhaustive consideration of all the rulings on the point, the rule of Hindu Law (i e, of representation of the family by the manager) was enforced, and the manager's right to the sue as such was maintained.

In this Court in the case of *Shamrathi Singh* v *Kishan Prasad* (3) it was ruled that the managing members of a joint Hindu family carrying on a joint family business are not entitled to maintain a suit in their own names against the debtors of the family without joining with themselves either as plaintiffs or defendants all the other members of the family The decision in *Pateshri Partap Narain Singh* v *Rudra Narain Singh* (4) was distinguished.

Their Lordships of the Privy Council have reversed this decision in I L R, 33 All, 272, holding that there was no principle of law or custom applicable to such a case under which the managing members of a Hindu joint family entrusted with the management of the business could be held incompetent to enforce at law the ordinary business contracts they are entitled to make or discharge in their own names The decision in *Arunachala Pillai* v *Vythialinga Mudaliyar* (5) was quoted with apparent approval, and the decision in *Ramsebuk* v *Ramlall Koondoo* (6) explained, as also was that in *Alagappa Chetti* v *Vellian Chetti* (7) In respect to the latter their Lordships expressed the opinion that the proposition there laid down to the effect that the manager cannot sue without joining all those interested with him, if literally construed, goes too far

In *Jaddo Kunwar* v *Sheo Shankar Ram* (8) this Court also applied the rule of representation and held that the other members

(1) (1899) I L R, 23 Mad. 190
(2) (1911) 21 M. L. J, 508
(3) (1907) I. L. R., 29 All. 311.
(4) (1904) I. L. R, 26 All 528
(5) (1882) I. L. R., 6 Mad., 27
(6) (1881) I. L. R. 6 Calc. 815
(7) (1894) I. L. R. 18 Mad. 33.
(8) (1911) I L. R., 33 All. 71

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of the joint Hindu family were bound by the action of their managing members It is unnecessary to discuss any further rulings on the subject While there, no doubt, is a conflict of opinion as to whether the rule of procedure does or does not override the rule of Hindu Law which allows the manager to represent the family under certain conditions in the case of litigation as well as in the other concerns of ordinary life, the weight of opinion seems to me to be in favour of the rule of substantive law

Prior to the introduction of the Civil Procedure Code and the Transfer of Property Act this latter rule had full sway After wards the pendulum has swayed both ways Of late, the rule of Hindu law has been given precedence over the rule of procedure, and the latest decision of the Privy Council in *Kishan Prasad's* case can leave no doubt upon the point I, therefore am of opinion that the rule of Hindu Law must be given its full force, and that where the necessary conditions prevail, the manager of the family, when acting as such, can both sue and be sued in his representa tive capacity, and suits in such circumstances cannot be dismissed simply because the other members of the family are not before the court

It will always be open to the opposite party to plead that the person alleged to be the manager is, as a matter of fact, not the manager, and the issue as to this fact can be decided. It may also be similarly pleaded that he is not acting within the scope of his authority The result of this, no doubt, will be to leave it open to the other members of the family to attack the decree on the ground of fraud, &c , in a subsequent suit This is so even now, and suits by sons against their fathers and persons holding decrees against him are fairly frequent as it is

It would therefore be still advisable for the courts where the objection of non joinder is taken, to make the absent members parties to the suit if possible, so as to prevent the necessity of further litigation and to decide finally whether or not the action of the manager is within his authority and binding on his co-par cener

In the present case Hori Lal and Jaggannath are the managing members The property was purchased by the joint family with the burden of the plaintiff's mortgage already upon it. There is no defence open to their sons which is not open to them. The

sons cannot plead a debt contracted by their fathers for immoral or non family purposes The question is as to the validity or otherwise of the mortgage as created by the original mortgagors There is, therefore, no valid reason in this case for not applying to the parties the rule of substantive law which is binding upon them, and I would, therefore, hold that the decision of the court below is correct and would dismiss the appeal

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CHAMIER, J —I agree that the appellants cannot be allowed to challenge the finding of the lower appellate court that they are the managers of the joint family to which they belong The only question which we have to decide in this appeal is whether a suit can be maintained against the manager of a joint Hindu family alone to enforce a mortgage against property belonging to the family

A somewhat analogous question has arisen in First Appeal No 91 of 1911 which has been heard by this Bench of four Judges, namely, whether the manager of a joint Hindu family *suing as such*, can maintain a suit for the recovery of a mortgage debt due to the family I have stated the question in this way because I agree with my learned colleagues that the court below ought to have allowed the plaint to be amended, and that the case should be treated now as if the appellant had from the first sued as the manager of a joint family

The records of cases decided in these Provinces forty or fifty years ago show that in those days a joint Hindu family ordinarily sued and was sued through the manager of the family or through the more prominent members of the family, and the practice was recognized by their Lordships of the Privy Council as long ago as 1871 (see the remarks made in the case of *Jogendro Deb Roy Kut* v *Funindro Deb Roy Kut* (1) But the reports show many instances of cases in which, after a decree had been obtained by or against one or more members of a joint family, attempts were made by members who had not been impleaded to show that they were not bound by the decree which had been passed. Whether on account of the difficulties which resulted from that practice or for any other reason, there is no doubt that in many parts of India a practice has been growing up of impleading as many members of a joint family as possible (see the remarks made in the cases of *Kashinath*

(1) (1871) 14 Moo. I. A. 367 (376)

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Chimnaji v *Chimnaji Sadashiv* (1), *Naranji* v *Moti Gavanji*(2) and *Harihar Prasad* v *Mathura Lal* (3) In these Provinces it has been for many years the practice to join all the members of a joint family in a suit relating to the property of a joint family, and there are instances in this Court of suits having been dismissed on account of the non joinder of subordinate members of a family But objections on the score of non joinder of members of a family have generally been met by those members being added as parties or have been overruled as having been taken too late, and I know no case in this Court in which it has been definitely held that a manager of a joint family cannot sue or be sued on behalf of the family

An exhaustive review of the case law in the other High Courts will be found in the recent case of *Sheik Ibrahim* v *K R. Rama Iy r* (4) It shows, I think, that there has not been any uniform course of decisions in those Courts

The case of *Kishan Prasad* v *Har Narain* (5) has been regarded by some courts as deciding that a manager of a joint family can sue and be sued on behalf of the family It seems to me that all that their Lordships of the Privy Council decided in that case was that managing members of a joint family entrusted with the management of a business are competent to enforce *at law* the ordinary business contracts which they are entitled to make or discharge in their names, but the language used by their Lordships in more than one place in their judgement suggests that they were of opinion that, apart from the case of a family business, the managing member of a joint family *suing as such* is entitled to maintain a suit to establish a right belonging to the family without making other members of the family parties. Indeed, this seems to be a necessary conclusion from their decisions in such cases as that of *Daulat Ram* v *Mehr Chand* (6) On principle it would seem that the decision should be the same whether the question of the right of the manager to represent the family is raised in the suit brought by or against the manager, or in a subsequent suit brought by or against a member of the family not impleaded in the former suit to try the effect of the decision in the former suit as against him The

(1) (1906) I. L. R. 30 Bom. 477
(2) (1907) 9 Bom L. R. 1106
(3) (1908) 12 C W N, 633
(4) (1911) 21 M. L J 603.
(5) (1911) I. L. R., 33 All., 272.
(6) (1887) I. L. R., 15 Calc. 70

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manager of a joint family represents the family in its dealings with outsiders in all the ordinary affairs of life, at all events where he is acting within the scope of his authority or for the benefit of the family, and there seems to be no reason why he should not represent the family in a suit whether as plaintiff or defendant, unless there is some legislative enactment to the contrary It has been held more than once that the rule of procedure which is now order VII, rule 4, applies to the case of a manager of joint family suing on behalf of the family If those decisions are correct, the rule referred to shows that a manager can sue on behalf of a joint family

Except possibly in a few cases, there appears to be no presumption that a joint family has a manager or that any particular person is the manager The question whether a person before the court is the manager of a joint family is usually a question of fact to be dealt with like any other question of fact In one of the cases now before us the plaintiff claims to be the manager of a joint family and must be allowed an opportunity of proving his allegation if it is denied In the other case it has been found that the appellants are the managers of a joint family

Both on principle and on authority, I am of opinion that the manager of a joint Hindu family *suing as such* can maintain a suit alone for the recovery of a mortgage debt due to the family, and that a suit can be maintained against the manager of a joint family alone to enforce a mortgage against property belonging to the family If the manager sufficiently represents the family the provisions of order XXXIV, rule 1, are complied with

In conclusion I desire to refer to the cases of *Gendan Lal* v *Babu Ram* (1) and *Nathi Lal* v *Lala* (2) in the decision of which I took part. In the former it was neither alleged nor proved that the family had a manager who could represent the absent member, and, as my judgement shows it was not even contended that the absent member was sufficiently represented by any person before the Court, a circumstance which supports what I have said about the practice of this Court in recent years In the latter case a judgement was delivered which covered several cases Some members of the families of the plaintiffs had not been made parties We were disposed to hold that managing members could sue on behalf of the joint families to which they belonged, but none of the

(1) (1912) 9 A L J 65 (2) (1912) 9 A. L. J 410

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plaintiffs had sued as managers, and in some of the cases at all events it was impossible to presume that the managers were before the Court. Consequently we disposed of the appeals on another ground.

I agree with the order proposed by the learned Chief Justice in this case.

BY THE COURT.—The order of the Court is that the appeal be dismissed but we make no order as to the costs in this Court. We extend the time for payment for six months from this date.

Appeal dismissed.

1912 May 27

Before Sir Henry Richards, Knight, Chief Justice, Mr. Justice Banerji, Mr. Justice Tudball and Mr. Justice Chamier.

MADAN LAL (PLAINTIFF) v. KISHAN SINGH AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Mortgage—Mortgage for benefit of joint family—Suit for sale by managing member alone—Parties—Civil Procedure Code (1908), order XXXIV, rule 1.

Where in a suit for sale on a mortgage executed in favour of the manager of a joint Hindu family the plaintiff was the then managing member of the family it was *held* that he was entitled in that capacity to maintain the suit and that it would not fail by reason of the non-joinder of the plaintiff's son, who was joint with him. *Hori Lal* v. *Munman Kunwar* (1) referred to.

This was a suit on foot of two mortgage bonds bearing date the 11th of July, 1877 and the 8th of August, 1884 respectively. They were executed by one Tori Singh in favour of Ram Prasad. The present suit was by Madan Lal, grandson of Ram Prasad. The plaintiff came into court alleging himself to be the surviving member of the family. He did not join a son of his, aged four years, in the suit with him. His suit was dismissed in the lower court as he had failed to join the son with him. The plaintiff pleaded that he was suing as head of his family and in the alternative sought leave to amend the plaint to that effect.

The Hon'ble Dr. *Sundar Lal* (Munshi *Girdhari Lal Agarwala* with him), for appellant:—

The head of a family was entitled to maintain a suit like that in his own name as manager. It was an act he was doing for the benefit of the family. Nor need he state in the plaint that he is suing as manager provided that he makes it clear that he is suing in that capacity. Here he made an application to that effect.

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* First Appeal no. 91 of 1911 from a decree of Gokul Prasad, Subordinate Judge of Shahjahanpur, dated the 23rd February, 1911.

(1) *Supra* p. 549.

That the other members are not necessary parties is clear from the fact that it is possible to bring them on the record even if a fresh suit brought against them would be barred, *Pateshri Partap Narain Singh* v *Rudra Narain Singh* (1) In that case it was held that the property had ceased to be impartible and both brothers were equally entitled The younger brother was made a party by the High Court Again a co mortgagee could bring a suit himself to recover the whole amount At most the others might be made defendants, but he was competent to maintain the suit According to *Barber Maran* v *Ramana Goundan* (2) he can give a valid discharge

[Munshi *Binode Behari*, for the respondents, pointed out that this court had held otherwise in *Ram Chandra* v *Rajjan Lal* (3)]

To take the first point—the most recent case was *Ramayya* v *Venkataratnam* (4) In *Adaikkalam Chetti* v *Marimuthu* (5) and *Nathi Lal* v *Lalu* (6) the other members were made defendants by the High Court There was a large body of cases where suits were brought by the managing member alone or against him alone, *Husein Begam* v *Zia ul nisa Begam* (7), *Daulat Ram* v *Mehr Chand* (8), *Thakurmani Singh* v *Dai Rani Koeri* (9) *Ram Narain Lal* v *Bhawani Prasad* (10) The case of *Ghulam Kadir Khan* v *Mustakim Khan* (11) was wrongly decided It followed *Matadin Kasodhan* v *Kazim Husain* (12) The point there was that all persons must be brought on the record to represent the entire property—as the whole of it was sought to be sold In *Bhawani Prasad* v *Kallu* (13) the suit was by a son praying that the decree was not binding on him as he was not a party In old times the manager represented the entire family—later the tendency came in of making every one a party It was only by reason of difficulties that might arise if a member was not made a party that people tried to implead everyone There was no change of principle Another case on the lines of 3 All was *Phul Chand* v *Lachmi Chand* (14)

(1) (1904) I. L. R. 26 All. 528
(2) (1897) I. L. R. 20 Mad 461
(3) (1909) I. L. R. 32 All., 164.
(4) (1893) I. L. R. 17 Mad., 122.
(5) (1899) I. L. R. 22 Mad. 326
(6) (1912) 9 A L. J, 410
(7) (1882) I. L. R., 6 Bom., 467
(8) (1887) I. L. R. 15 Calc. 70
(9) (1906) I. L. R 33 Calc 1079
(10) (1881) I. L. R 3 All. 443
(11) (1895) I. L. R. 18 All. 109
(12) (1891) I. L. R. 13 All. 432.
(13) (1895) I. L. R., 17 All. 537
(14) (1882) I. L. R., 4 All., 486

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MADAN LAL v KISHAN SINGH

Munshi *Benode Behari*, for the respondents —

The frame of the suit was governed by the Code of Civil Procedure The question was if a managing member could sue on behalf of all the others It would involve considerable difficulties *Kalidas Kevaldas* v *Nathu Bhagvan* (1) A debtor would not be satisfied if a managing member gave him a discharge, he would want the others to join If one of them was inaccessible, he could say that the manager had no right to give a full discharge and he could reopen thematter In case the mortgagor wished to pay out of court he could get a discharge from the manager because the son could not ask for accounts In *Dwarka Nath Mitter* v *Tara Prosunna Roy* (2) where a managing member brought a suit without making a member a party, it was held that the suit was not maintainable

The following cases were referred to *Angamuthu Pillai* v *Kolandavelu Pillai* (3) *Alagappa Chetti* v *Vellian Chetti* (4), *Gopal* v *Macnaghten* (5)

The Hon ble Dr *Sundar Lal*, in reply —

Most of the cases were discussed in *Kishan Pershad* v *Har Narain* (6)

18 Mad was also the case of a firm, and 7 Calc was the case of co-parceners If a member could be sued through the head of the family and all the property was sold—he could dispute the sale only on the ground of immorality—there was no reason why the manager should not sue for the benefit of the family He referred to *Krishnama* v *Perumal* (7) *Jeo Lal Singh* v *Gunga Pershad* (8) *Daulat Ram* v *Mehr Chand* (9) *Sheo Pershad Singh* v *Raj kumar Lal* (10) *Baldeo Sonar* v *Mobarak Ali Khan* (11), *Devi Singh* v *Ram Manohar* (12), *Phul Chand* v *Lachmi Chand* (13) *Gan Savant Bal Savant* v *Narayan Dhond Savant* (14), *Bhana* v *Chindhu* (15) and *Kunjan Chetti* v *Sidda Pillai* (16)

(1) (1883) I. L. R. 7 Bom. 217
(2) (1889) I. L. R. 17 Calc 160
(3) (1899) I. L. R., 23 Mad. 190
(4) (1894) I. L. R., 18 Mad., 33
(5) (1881) I. L. R. 7 Calc 751.
(6) (1911) I. L. R. 33 All., 272
(7) (1884) I. L. R. 8 Mad., 388
(8) (1884) I. L. R. 10 Calc., 996
(9) (1887) I. L. R. 15 Calc., 70
(10) (1892) I. L. R. 20 Cal., 453.
(11) (1903) I. L. R. 30 Calc. 583.
(12) (1890) I. L. R., 2 All., 746.
(13) (1882) I. L. R., 4 All., 486.
(14) (1883) I. L. R. 7 Bom., 467
(15) (1896) I. L. R., 21 Bom., 616
(16) (1898) I. L. R., 22 Mad. 461.

RICHARDS C J —This appeal arises out of a suit to realize the amount of a mortgage dated the 11th August 1884 It was pleaded by way of defence amongst other things that the plaintiff and his minor son, Bisheshar Dayal were a joint Hindu family and that the suit could not be maintained because the mortgage was of family property and the son was not made a party Plaintiff urged against this plea that he was manager and represented the family Plaintiff also asked that the plaint might be amended by stating therein that he sued as manager The Court below refused to amend the plaint and dismissed the suit on the ground that the son was necessary a party to the suit

The appeal has been referred to this Bench because of the conflict of judicial decisions on the question

Apart from authority I can see no reason why the son should be a necessary party to the suit It must be assumed for the purpose of this appeal that the plaintiff is the manager of the family If, before the suit was instituted, the owners of the equity of redemption had been ready and willing to pay off the mortgage, I think it is absolutely clear that the plaintiff as manager could receive the mortgage money and give the persons paying off the money a good discharge and I can see no reason why they should require the presence of any other party

Order XXXIV rule 1, of the Code of Civil Procedure no doubt, requires that persons interested in the mortgage security should be parties, but I think, in a case like the present the son is virtually a party through the manager and that order XXXIV, rule 1, is substantially complied with

The same question in principle arose in Second Appeal No 361 of 1911 (1) which was argued before this Bench In my judgement in that case I gave my reasons for holding that the manager of a joint family can represent the family I would allow the appeal and remand the suit

BANERJI J —The point raised in this appeal has practically been decided in Second Appeal No 361 of 1911 (1) in which judgement has this day been delivered

In this case the plaintiff omitted to join with him as plaintiff his minor son who is four years old For this omission the suit has been dismissed It is manifest from the plaint that the

(1) *Supra* p. 549

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debt which the plaintiff seeks to recover is alleged to be a debt due to the joint family of which he and his minor son are members. The mortgages which form the basis of the claim are in favour of Ram Prasad the grandfather of the plaintiff and the great grandfather of his son. This is recited in the plaint. At an early stage of the suit the plaintiff stated to the Court that he was suing in his capacity as manager of the joint family and applied for amendment of the plaint. The Court in my opinion improperly rejected this application. The defendants clearly had notice that the plaintiff was suing as manager. I have in my judgement in S. A. No. 361 stated my reasons for holding that where a suit is brought by the manager of a joint Hindu family, the other members of the family must be deemed to be parties to the suit through him, and the omission of the names of those members from the array of parties would not be a defect fatal to the suit. Of course, if in a suit like this the other members wish to join or apply to be added as parties the Court should never refuse to add them, but the suit ought not, in any event, to be dismissed if, in fact, it has been instituted by the manager of the joint family for the recovery of debt due to the family. As the manager is competent to give a full discharge to the debtor, the latter can have no reason to complain of the omission of the persons whom the manager represents. In this respect the case of a joint Hindu family is different from that of other joint creditors. The matter is in my opinion concluded by the principle of the decision of their Lordships of the Privy Council in *Kishan Prasad* v. *Har Narain Singh* (1). I would allow the appeal, set aside the decree of the court below and remand the case to that court for trial on the merits.

TUDBALL, J.—This appeal arises out of a suit for sale on a mortgage against the heirs of the original mortgagor and certain subsequent transferees. It has been dismissed on a preliminary point, the lower court having held that the plaintiff alone is not competent to maintain the suit.

The original mortgagee was Lala Ram Prasad, the plaintiff's paternal grandfather and the plaintiff's case as disclosed in the plaint was that his grandfather, his father his uncle and himself formed a joint Hindu family and that the three former having

(1) (1911) I. L. R. 33 All. 272.

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died, he was the sole owner of the mortgage debt by the right of survivorship and entitled to sue But it is an admitted fact that the plaintiff has an infant son who is joint with him

Before the first date fixed for the case the plaintiff applied to the court to be allowed to amend his plaint by adding thereto that he was suing as manager of the joint family (consisting of himself and his son) The court below without passing any orders on this application, dismissed the suit holding that the amendment could not improve the position of the plaintiff, because the manager of a Hindu family cannot sue without joining those interested with him. The decision was based on the ruling of this Court in the case of *Shamrathi* v *Kishan Prasad* (1)

This decision has since been overruled by their Lordships of the Privy Council In Second Appeal No 361 of 1911 (2) this Bench has fully discussed the right of the manager of a joint Hindu family to represent the family and have held that he can sue and be sued as such, so that the decree, under certain circumstances, may be binding on the other co-parceners It is unnecessary to repeat what has already been said in the judgements in that case

In my opinion the plaintiff ought to have been allowed to amend his plaint, and the suit as amended is maintainable Of course, it is open to the defendant to plead that he is not the manager though in the circumstances of the case that appears to be a hopeless plea

I would, therefore, allow the appeal and remand the suit to the lower court with orders to allow the plaint to be amended and to decide the suit on the merits

CHAMIER, J —I agree that the court below ought to have allowed the plaint to be amended The question for decision in this appeal appears to me to be whether the manager of a joint Hindu family, *suing as such*, can maintain a suit alone for the recovery of a mortgage debt due to the family For the reasons which I have given in my judgement in Second Appeal No 361 of 1911 (2) I am of opinion that he can. I agree in the order proposed by the learned Chief Justice

BY THE COURT —The order of the Court is that we allow the appeal set aside the decree of the court below and remand the

(1) (1907) I. L. R., 29 All. 311 (2) *Supra* p 549

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case to that court with directions to readmit the suit under its original number in the register and to proceed to try it on the merits after allowing the amendment of the plaint as prayed for by the plaintiff. Costs here and heretofore will abide the result.

Appeal allowed. Cause remanded.

PRIVY COUNCIL

P C*
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June 18 19
July 12.

FATEH CHAND AND OTHERS (PLAINTIFFS) v KISHAN KUNWAR (DEFENDANT) *

[On Appeal from the High Court at Allahabad]

Second appeal Questions of law and fact—Construction of document—Wajib-ul arz construction of—Civil Procedure Code (1882) *sections* 584 585—*Landholder and tenant—Rights of zamindars in respect of house sites and groves*

In a suit for a declaration of the proprietary title of the appellants to certain lands in a village the first court dismissed the suit on the ground that the respondent was the zamindar and the appellants only tenants of the lands The Subordinate Judge found on the construction of the wajib-ul arz of the village and other documentary evidence that the appellants were the owners of the lands in suit On second appeal to the High Court it was contended that the Court was bound under section 584 of the Civil Procedure Code 1882 to accept the finding of the Subordinate Judge as conclusive, the question being one of fact but the High Court rejected that contention

Held (affirming that decision) that the Subordinate Judge s finding was arrived at by inferences drawn from a misconstruction of the wajib-ul arz The right construction of documents was a question of law which the Court on second appeal was not precluded from considering under sections 584 and 585 of the Civil Procedure Code

On the true construction it was clear from the documentary evidence that the appellants were only tenants of the land and not proprietors

Appeal from a judgement and decree (7th November, 1906) of the High Court at Allahabad which reversed a judgement and decree (25th July, 1904) of the Subordinate Judge of Aligarh, which latter decree had reversed the decree (22nd September, 1903) of the Munsif of Etah.

The matter in dispute in this appeal was as to the right of the plaintiffs (the present appellants) who were the purchasers as they alleged, at private sales of the 20th of May, 1900 and the 15th of January, 1901 of certain resumed *muafi*, dwelling houses and groves situate in a village of which the defendant (the present respondent) was the zamindar -to be declared proprietors in possession of the properties and entitled to have their names recorded, as absolute owners in the revenue papers as against the defendant.

The facts of the case sufficiently appear from the report of the case in the High Court (SIR GEORGE KNOX and RICHARDS JJ)

* *Present* :—Lord SHAW, Sir JOHN EDGE and Mr AMEER ALI,

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which will be found in I L R, 29 All, 203, and are also stated in the judgement of their Lordships of the Judicial Committee

The Munsif dismissed the suit with costs finding that the plaintiffs were at most occupancy tenants without power of sale. The Subordinate Judge on appeal reversed that decision and on the evidence granted the plaintiffs a decree declaring their absolute ownership and giving them possession. On the appeal by the defendant to the High Court it was contended for the plaintiffs that, it being a second appeal, the finding of the Subordinate Judge, being a finding of fact with which the court could not interfere, must be taken to be conclusive under sections 584 and 585 of the Civil Procedure Code (XIV of 1882) The High Court rejected this contention on the ground that the decision of the Subordinate Judge was "founded on erroneous inferences of law drawn from certain documents and the wajib ul arz, which were given in evidence" The High Court therefore, allowed the appeal and set aside the decree of the Subordinate Judge

An application for review by the plaintiffs, and an application for leave to appeal to His Majesty in Council having both been rejected by the High Court special leave to appeal was granted by His Majesty in Council

On this appeal—

B Dube for the appellants contended that they and their predecessors in title were the owners of the lands in dispute, as had been held by the Subordinate Judge on the construction of the wajib ul arz and the other evidence in the case The High Court, it was submitted was bound by this finding the case when before that court being a second appeal, on which, under section 584 and 585 of the Civil Procedure Code 1882 findings of facts were to be taken as being conclusive The High Court was therefore wrong in the construction it put on the wajib ul arz and in holding that the appellants had no proprietary rights in the lands Both the Munsif and the Subordinate Judge had found that Rampur was not an agricultural village but a town to which the wajib-ul arz of the district, it was contended, did not apply Assuming that the appellants were merely tenants, they had admittedly exercised heritable and transferable rights of ownership over the lands which had never been disputed. It was a question of custom and

that was a question of fact Under the circumstances, therefore, the onus was on the respondent to show that the appellants were not entitled to proprietary ownership of the lands in suit Reference was made to *Lekraj Kuar* v *Mahpal Singh* (1), *Anant Singh* v *Durga Singh* (2), Evidence Act (I of 1872) section 35, *Durga Chowdhrani* v *Jewahir Singh Chowdhri* (3), *Anangamanjari Chowdhrani* v *Tripura Sundari Chowdhrani* (4), *Sri Girdhariji Maharaj* v *Chote Lal* (5), Rule 13 of the Rules of the Allahabad High Court, dated the 13th January 1898, *Parbati Kunwar* v *Chandarpal Kunwar* (6), *Ramgopal* v *Shamskhaton* (7), *Lukhi Narain Jagadeb* v *Jodu Nath Deo* (8), *Nilmoni Singh Deo Bahadur* v *Kirti Chunder Chowdhry* (9), *Joy Kishen Mookerjee* v *Doorga Narain Nag* (10), Act IX of 1889 (North Western Provinces and Oudh Kanungos and Patwaris Act), section 5, *Muhammad Imam Ali Khan* v *Husain Khan* (11), Act II of 1901 (Agra Tenancy Act), Act III of 1901 (United Provinces Land Revenue Act), Chaukidari Act (XX of 1856), and the United Provinces Gazetteer

Sir Erle Richards, K C and *W A Raikes* for the respondent contended that the appellants had entirely failed to prove that they or their predecessors ever had anything beyond tenants rights in the lands in suit The lands on which the houses were built had all along been part of the zamindari lands belonging to the respondent s village Those lands were included in the wajib ul arz of the village They were lands of the zamindar unless something specific was proved as to them which changed the proprietorship Since 1877 when the question of imposing rent on these lands was considered they had always been assessed with rent There was no question of fact involved here The question was as to the true construction of the wajib ul arz and other documents If

(1) (1879) I L.R. 5 Calc, 744 (750): L R. 7 I.A., 63 (70)
(2) (1910) I.L.R 32 All. 363 L.R, 37 I A 197
(3) (1890) I.L R., 18 Calc 23 (30): L R 17 I.A 122 (127)
(4) (1887) I L R. 14 Calc 740 (747) L.R 14 I.A 101 (109)
(5) (1898) I L.R., 20 All., 248
(6) (1909) I L.R 31 All. 457 (475) L R 36 I A 125 (131)
(7) (1892) I.L.R 20 Calc 93 (99) L.R, 19 I A 228 (233)
(8) (1893) I.L.R 21 Calc 504 (512,513) L R. 21 I.A., 39 (43)
(9) (1893) I L.R. 20 Calc 847 (853): L.R. 20 I A., 95 (97)
(10) (1869) 11 W R., 348
(11) (1898) I.L.R. 26 Calc., 81 (92) L.R., 25 I.A., 161 (169)

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in that construction the appellants are proprietors, the respondent fails What is the right construction? Such a question came, it was submitted, if not under the second part of section 584 (usage having the force of law) then under the first part of that section (question of law) [Lord SHAW referred to *Ramgopal* v *Shamskhaton* (1) per Lord Watson —"The facts need not be questioned It is the soundness of the conclusions from them that is in question, and this is a matter of law"] Reference was made to the Civil Procedure Code, 1882, Ed by Ameer Ali and Woodroffe, page 391. The cases referred to for the appellant dealt with pure questions of fact, and were not applicable to the present case As to "usage having the force of law,' *Kaharla Abbaya* v *Venkata Subbaya Rao* (2) was cited Where matters between landlord and tenant were determined by Government in documents, it is on the right construction of those documents that any dispute between them should be decided

Dube replied.

1912 *July* 12*th* —The judgement of their Lordships was delivered by Sir JOHN EDGE —

This is an appeal by special leave from a decree of the High Court of Judicature for the North Western Provinces of India, dated the 7th of November, 1906 which reversed the decree of the Subordinate Judge of Aligarh, dated the 25th of July 1904 which had set aside the decree of the Munsif of Etah dated the 22nd of September, 1903, dismissing the suit with costs

The suit, which related to the proprietary title to lands in Rampur was brought in the Court of the Munsif of Etah by Lala Fateh Chand, since deceased and others against Rani Kishan Kunwar and others to obtain the cancellation of an order of the 4th of January 1902 of a Court of Revenue, for a declaration that the plaintiffs were the proprietors in possession of the lands in the plaint mentioned and as such were entitled to have their names entered in the revenue papers as proprietors, and for consequential reliefs Some of the lands in question consisted of lands in the *abadi* of Mauza Rampur Upon those lands in the *abadi* houses had formerly stood. It is not clear from the record whether or not all of those lands in the *abadi* had been cleared of houses and had been

(1) (1892) I.L.R. 20 Calc., 93 (99) L.R., 19 I A. 228 (233) (2) (1905) I L R. 29 Mad., 21

brought into cultivation, but apparently they had been brought into cultivation before suit. It is however, not necessary to ascertain whether or not all of those lands in the *abadi* had been brought into cultivation as it is the proprietary title to the land, whether covered with houses or not, and not the title to the houses, if any, standing upon those lands which is in question in this suit. The remainder of the lands to which the suit relates were lands under groves. Rani Kishan Kunwar was the zamindar of the whole Mauza Rampur, and she alone defended the suit. By her written statement Rani Kishan Kunwar put in issue the alleged title of the plaintiffs as proprietors.

Fateh Chand the deceased plaintiff had applied to the Revenue Court to have his name entered as that of the proprietor of the lands in question in the revenue papers relating to Mauza Rampur. On the 4th of January 1902, the Assistant Collector rejected that application with costs, and on the 9th of January, 1903, the plaintiffs brought this suit in the Civil Court. The Munsif of Etah, having found as a fact that the defendant Rani Kishan Kunwar was the zamindar of Mauza Rampur and that the plaintiffs were tenants and were not proprietors of the lands in the plaint mentioned by his decree of the 22nd of September, 1903, dismissed the suit.

From that decree of the Munsif the plaintiffs appealed and in their grounds of appeal alleged that they were the owners in possession of the plots in suit and that in Qasba Rampur the zamindar is not the owner of the *abadi*, but the lower class of people, who are her ryots are the owners. The plaint and the grounds of appeal to which their Lordships have referred put it beyond doubt that the title which the plaintiffs claimed in the Munsif's Court and on appeal from the Munsif's decree was the proprietary title to all the lands mentioned in the plaint, and was not any inferior title. The Subordinate Judge of Aligarh in the appeal found on his construction of the wajib ul arz and other documentary evidence that the plaintiffs were the owners of the lands in respect of which the suit was brought, and by his decree declared that the plaintiffs were the owners in possession of the property, and decreed the plaintiffs claim. From that decree of the Subordinate Judge the defendant Rani Kishan Kunwar appealed to

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FATEH CHAND v. KISHAN KUNW

the High Court of Judicature for the North Western Provinces of India at Allahabad

At the hearing of the appeal in the High Court it was urged in argument on behalf of the plaintiffs that the appeal being a second appeal to which sections 584 and 585 of the Code of Civil Procedure applied, the High Court was bound to accept as conclusive and was precluded from questioning, the correctness of the finding of the Subordinate Judge that the plaintiffs were the proprietors of the lands in respect of which the suit was brought Sir George Knox and Richards, JJ, who heard the appeal, overruled the objection, and on their construction of the wajib ul arz and other documents in the suit in their judgement stated and found —

"From the judgement of the lower appellate Court it appears that it is founded on inferences of law drawn by the learned Subordinate Judge from certain documents and the wajib ul arz which were given in evidence The documents show that the owners of houses in Rampur had been in the habit of selling and transferring their houses The wajib ul arz sets forth that the occupiers of houses had this power but all through the entries the zamindar is recognised and it is stated that if a new house is to be built the permission of the zamindar must be obtained The entry in the wajib ul arz as to groves is to the effect that isolated trees and clumps of bamboos planted by the tenant can be cut by him, and as to rent free groves if the trees should die out and the land be brought into cultivation rent must be paid and that if a new grove was to be planted the leave of the zamindar must be obtained The inference of law that the Subordinate Judge has drawn from this evidence (about which there is no dispute) is that the occupiers of the groves and of the land which had been the sites of the houses were the absolute property of the persons who occupied and used them. In our judgement this inference is a wrong and impossible inference and the decision of the learned Subordinate Judge based thereon is clearly wrong

The High Court by its decree allowed the appeal and restored the decree of the Court of the Munsif From that decree of the High Court this appeal to His Majesty has been brought The principal ground of this appeal is that the decree of the Subordinate Judge is right and that the plaintiffs are the owners of the lands in dispute

On the hearing of this appeal the learned counsel on behalf of the appellants contended that the Judges of the High Court should have accepted the findings of the Subordinate Judge on the question of title as correct and as binding on them in second appeal and were not at liberty to find that the plaintiffs were not the proprietors of the lands in question. He also contended that the Judges of the High Court had misconstrued the wajib ul arz and

the other documentary evidence and had come to a wrong conclusion He further contended that the wajib ul arz of Mauza Rampur, which was made in the settlement which commenced in 1872 and extracts from which are on the record of this suit, cannot be treated as applying to the *abadi* of Mauza Rampur the contention being that Rampur, owing to the number of its inhabitants many of whom are not agriculturists, and owing to the fact that the Government has applied the Chaukidari Act (Act No XX of 1856) to Rampur must be regarded as a town and not as a purely agricultural village, to which, according to the learned counsel s contention, a wajib ul arz is alone applicable The answer to the contention that the wajib ul arz does not apply to the *abadi* of Mauza Rampur appears to their Lordships to be that the wajib ul arz to which reference has been made was prepared by the settlement officer for the whole Mauza Rampur including the *abadi* and that all those who were interested were at the time given the opportunity of objecting to the statements contained in it, and further that the Government by applying the Chaukidari Act to Rampur did not alter and could not have altered proprietary rights in Mauza Rampur or in any part of the mauza The wajib ul arz is in their Lordships opinion cogent evidence of the rights as they existed when it was made of those holding proprietary or other rights of property within the mauza, and it has not been shown that the wajib ul arz to which reference has been made in this suit differs in any material respect from the wajib ul arz which their Lordships have been informed by counsel was made in the more recent settlement

The Judges of the High Court rightly overruled the objection that they were bound to accept as correct the finding of the Subordinate Judge that the plaintiffs were the proprietors of the lands to which this suit referred That finding of the Subordinate Judge was the result of his having misconstrued the wajib ul arz. The right construction of documents is a question of law which Judges in second appeals are not by sections 584 and 585 of the Code of Civil Procedure, precluded from considering by any finding of a lower appellate Court, based upon such documents The Subordinate Judge arrived at his finding by inferences drawn upon an incorrect construction of the wajib ul arz, and the Judges in second

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FATEH CHAND v. KISHAN KUNWAR

appeal consequently were not bound by his finding that the plaintiffs were the proprietors of the lands

In the wajib ul arz it is stated that Mauza Rampur "is a mahal of Zamindari Khalis (held by a single person), and Raja Ram Chandar Singh is the only proprietor without any co sharer" Raja Ram Chandar Singh was the husband of the defendant Rani Kishan Kunwar, the present zamindar There is no documentary evidence to show that the plaintiffs or their predecessors in title ever were proprietors of any of the lands to which this suit relates, on the other hand the *jamabandi* shows that predecessors in title of the plaintiffs paid rent as tenants for some of those lands and in the *Khasra* for 1297 Fasli the defendant Rani Kishan Kunwar is entered as the proprietor of some of these lands and predecessors in title of the plaintiffs are entered as the tenants The zamindar was not affected by any transfer of lands to which he was not a party, and in the wajib ul arz neither the plaintiffs nor any predecessors of theirs are shown as tenants who had special rights which were heritable and transferable

The following paragraphs of Chapter IV of the wajib ul arz relate to groves and houses and are important —

Paragraph 3 —Relating to the rights of tenants in respect of groves and scattered trees

"A tenant has power to cut down the grove or the scattered trees planted by him in his neighbourhood

If the land is rent free and the trees have been removed therefrom and the land is brought under cultivation, the tenant shall have to pay the rent If in future a grove is planted it can be planted with the permission of the zamindar

Paragraph 4 —Relating to the rights of the tenants in respect of the houses in the village and of those which are built

A person residing in a house is owner thereof and he has power to transfer it but in future a new house shall be built with the consent of the zamindar

"The tenants of the lower class have no power to transfer their houses

There is evidence on the record that when land in the abadi is brought under cultivation the tenant has to pay rent for it In their Lordships opinion the Judges of the High Court rightly construed the wajib ul arz and drew the legitimate inference from it and the other documentary evidence in the suit.

On behalf of the plaintiffs appellants in their appeal the learned counsel who appeared for them pressed their Lordships to advise that the plaintiffs appellants should be declared to have heritable

and transferable rights in the lands in suit and for that purpose admitted that the plaintiffs appellants were tenants of those lands Apart from other considerations it is sufficient for their Lordships to say that that is not the claim in respect of which this suit was brought

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FATEH CHAND v KISHAN KUNWAR

Their Lordships will humbly advise His Majesty that this appeal should be dismissed and the decree of the High Court be affirmed The appellants must pay the costs of the appeal

Appeal dismissed

Solicitors for the appellants —*Barrow Rogers & Nevill*

Solicitors for the respondent —*T C Summerhays & Son*

J V W

1912
May 31,

APPELLATE CIVIL

Before Mr Justice Karamat Husain and Mr Justice Tudball

KUBER NATH AND OTHERS (PLAINTIFFS) v MAHALI RAM AND ANOTHER (DEFENDANTS)*

Act No IX of 1872 (Indian Contract Act) sections 23 27—Agreement between several firms to fix rates for ginning and baling cotton and to share profits—Agreement neither in restraint of trade nor against public policy

Held that an agreement whereby certain firms fixed the rates to be charged for ginning and baling cotton and further as to the manner in which the profits should be shared by the parties thereto was an agreement neither in restraint of trade nor opposed to public policy

Haribhai Maneklal v *Sharafali Isabji* (1) and *Frazer & Co* v *The Bombay Ice Manufacturing Co* (2) followed

The facts of this case were as follows —

The managers of five ginning firms came to an agreement, whereby they fixed the rates to be charged for ginning and baling cotton, thus forming a combination and agreed that for a certain definite period the profits of ginning would be 7 annas 6 pies and of baling 1 anna 6 pies per maund They further agreed that the profits were to be divided and that those for baling were to be divided equally while those for ginning were to be divided in proportion to the ginning capacity of the various factories A dispute as to the ginning capacity of the factories arose and the suit was instituted by the

* Second Appeal No 840 of 1911 from a decree of H M Smith Additional Judge of Aligarh, dated the 3rd of May 1911 modifying a decree of Shikhar Nath Banerji Additional Subordinate Judge of Aligarh dated the 8th of August 1910

(1) (1897) I. L. R., 22 Bom., 861. (2) (1904) I. L. R., 29 Bom., 107

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KUBER NATH v. MAHALI RAM.

plaintiffs for their share of the profits according to the ginning capacity of their mills. The court of first instance decreed the claim. On appeal, the decree was slightly modified by the lower appellate court as to the amount to which the plaintiffs were entitled.

The plaintiffs appealed to the High Court.

The Hon'ble Dr. *Sundar Lal*, for the appellants.

Mr. *B. E. O'Conor* and Dr. *Tej Bahadur Sapru*, for the respondents.

KARAMAT HUSAIN and TUDBALL, JJ.:—The managers of five ginning firms came to an agreement, whereby they fixed the rates to be charged for ginning and baling cotton, thus forming a combination, and agreed that for a certain definite period the profits of ginning would be 7 annas 6 pies and of baling 1 anna 6 pies per maund. They further agreed that the profits were to be divided, and that those for baling were to be divided equally, while those for ginning were to be divided in proportion to the ginning capacity of the various factories. A dispute as to the ginning capacity of the factories arose and the suit was instituted by the plaintiffs for their share of the profits according to the ginning capacity of their mills. The court of first instance decreed the claim. On appeal the decree was slightly modified by the lower appellate court as to the amount to which the plaintiffs were entitled. In second appeal to this Court the only point pressed before us is that the agreement relied on was contrary to public policy and void in law. There are two cases decided by the Bombay High Court—*Haribhai Maneklal* v. *Sharafali Isabji* (1) and *Frazer & Co.* v. *The Bombay Ice Manufacturing Company* (2)—which show that such a contract is neither in restraint of trade nor opposed to public policy. We agree with these rulings. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(1) (1897) I. L. R. 22 Bom., 861.

(2) (1904) I. L. R. 29 Bom., 107.

REVISIONAL CRIMINAL

1912
June 7

Before Mr Justice Chamier

EMPEROR *v* MADAN GOPAL.*

Act No XLV of 1860 *(Indian Penal Code) section* 498—*Enticing away a married woman—Marriage—Hindu law—Whether marriage legal between a Banya and the illegitimate daughter of a Brahman and a Banya woman*

Held that there was no reason why a marriage between a Banya and the illegitimate daughter of a Brahman father and Banya mother should not be valid according to Hindu law especially when the marriage was recognized by the caste to which the husband belonged

Padam Kumari v *Suraj Kumari* (1) and *In the matter of Ram Kumari* (2) referred to

The facts of this case were as follows —

One Madan Gopal was convicted by a magistrate of the second class in the Benares district under section 498 of the Indian Penal Code of having enticed away Musammat Kharag Kumari, the wife of Gokul Prasad. Madan Gopal appealed to the District Magistrate, but without success He then applied to the High Court in revision upon two grounds, first, that it was not satisfactorily proved that he had enticed away Musammat Kharag Kumari, and secondly, that the marriage of Kharag Kumari with Gokul Prasad was according to the Hindu law invalid

Mr *R K Sorabji*, for the applicant

The Assistant Government Advocate (Mr *R Malcomson*) for the Crown.

CHAMIER, J —The applicant was convicted by a magistrate of the second class in the Benares district under section 498, Indian Penal Code, of having enticed away Musammat Kharag Kumari, who was the wife of the complainant, Gokul Prasad. The applicant appealed to the District Magistrate without success He has now applied to this Court to set aside the conviction on two grounds, namely, that there is no evidence that he enticed the woman away and that she is not the lawfully married wife of the complainant. On the first point there are the concurrent findings of the courts below, and having looked into the evidence I see no reason to think that they are erroneous On the second point it is conceded that the prosecution had to establish that Kharag Kumari was the

* Criminal revision No 250 of 1912 from an order of C A O Streatfeild District Magistrate of Benares dated the 2nd of April 1912

(1) (1906) I L. R. 28 All. 458 (2) (1891) I. L. R., 18 Calc. 264

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wife of the complainant. The prosecution proved that the complainant married Kharag Kumari eleven or twelve years ago in Nepal, to which country both parties seem to have originally belonged. The prosecution also proved that complainant and Kharag Kumari had lived together as husband and wife ever since the marriage, and that they had been recognized as husband and wife by their caste-fellows. There is also definite evidence that all the usual ceremonies were performed at the marriage. In these circumstances it seems to me that it must be presumed till the contrary is shown that Kharag Kumari is the lawful wife of the complainant. The applicant contended that she could not be the lawful wife of the complainant because she was the daughter of a Brahman by a mistress of the Banya caste, whereas complainant is a Banya of legitimate birth. Counsel for the applicant relied upon the decision of this Court in *Padam Kumari* v. *Suraj Kumari* (1), that whatever may have been the case in ancient times, a marriage between a Brahman and Kshatrya woman is now invalid and upon the opinions expressed by Mayne and other writers on the Hindu law that marriages between persons of different castes have long since become obsolete. It is not clear how far the prohibition of inter marriage between castes applies to marriages between persons of hybrid caste or marriages between a person of hybrid caste and a Brahman or a Kshatrya or a Vaisya or a Sudra. According to Manu, Chap X, verse 8, Kharag Kumari should be called Ambashtha or Vaisya. In practice however it seems that a child born of parents of different castes though an outcaste in the strict sense, is regarded for many purposes as belonging to the caste either of its father or of its mother. There is no evidence as to whether Kharag Kumari was regarded as a Brahman or a Banya but if, as is possible even probable she was regarded as belonging to the Banya caste, there would even according to modern usage, be no obstacle to a marriage between her and the complainant, though the latter would perhaps be lowered in social estimation by such a marriage. Dr. Gurudas Banerjee in his work on the Hindu law of marriage 2nd Edition p. 73 says:—" At the present day when caste has become so elastic and loss of caste so rare, the general question whether an outcaste is eligible for marriage at all, and, if so in what caste is not of much practical importance

(1) (1906) I. L. R., 28 All., 458.

The only case of some difficulty is that of a person who is born of parents belonging to two different castes But even in these cases which however are by no means common, the child if recognized by relatives and others as belonging to the caste of either parent and is married in that caste And it may, perhaps be laid down as a general rule that so far as prohibition of inter marriage between different castes is concerned, a marriage would be valid or void according as the parties to it are or are not in point of fact recognized as belonging to the same caste According to this view of the law the marriage between the complainant and Kharag Kumari has been valid If the rule against inter marriage between persons of different castes were applied strictly, it is doubtful whether a person born of an illicit union between two Hindus, could contract a valid marriage at all In the case of *Ram Kumari* (1) the illegitimate child of Chhattri parents had been married according to Hindu rites to a man who was by caste a Chhattri The High Court held that as the parties to the marriage had been recognized by their castemen as belonging to the same caste, the marriage was lawful, and they also laid it down that illegitimacy was no absolute disqualification for marriage in the case of Hindus There is the further consideration in the present case that the parties belonged to Nepal where the Hindu Law of marriage may not be so strictly followed as it is in these Provinces I have been referred to no authority which requires me to hold that the marriage in the present case was invalid The applicant has failed to rebut the presumption that there was a valid marriage In my opinion he was rightly convicted under section 498 of the Indian Penal Code

I am asked to reduce the sentence on the ground that the applicant may have supposed that he was justified in regarding Kharag Kumari as the mistress not the wife of the complainant But there is nothing to show that the complainant or any one else has ever regarded her as a mistress The application is rejected

Application rejected

(1) (1891) I L R. 18 Calc 264.

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June, 8

REVISIONAL CIVIL

Before Mr Justice Sir George Knox and Mr Justice Karamat Husain

NAND RAM (APPLICANT) v BHOPAL SINGH (OPPOSITE PARTY)

Civil Procedure Code (1908) section 115—Revision—Interlocutory order—Scope of section

Held by KARAMAT HUSAIN J — that an application under section 115 of the Code of Civil Procedure cannot be entertained in the case of those interlocutory orders against which though no immediate appeal lies a remedy is supplied by section 105 which provides that they may be made a ground of objection in appeal against the final decree *Moti Lal Kashibhai* v *Nana* (1) followed

Inasmuch as an order under order IX, rule 13, setting aside an *ex parte* decree can be attacked in appeal from the final decree no application will lie for revision of such an order *Gopala Chetti* v *Subbier* (2) followed.

The facts of this case were as follows —

The plaintiff in 1910, sued on a mortgage made by two joint brothers, Bhopal and Bahadur Bhopal, his son Baddari grandson Harnarain Singh, and nephew Sham Lal, were defendants Baddari was appointed guardian *ad litem* of his minor son Harnarain, and notice was served upon him on the 14th of August, 1910 Bhopal signed it as a witness Notice was not served on Bhopal personally but the summons was affixed to the door of his house The record does not show if this was deemed by the Munsif to be sufficient service The suit was decreed on the 19th of December 1910 The decree against Bhopal was *ex parte* An application for an order absolute was made on the 16th of July, 1911, and granted

Bhopal, on the 1st of August, 1911, applied under order IX, rule 13, to have the *ex parte* decree set aside stating in the affidavit that on the date on which the case was heard he was in Allahabad. The Munsif holding that there was sufficient reason for his absence, set aside the *ex parte* decree on the 18th of December, 1911 and made another decree at variance with the *ex parte* decree on the 13th of February, 1912

The decree holder on the 19th of February, 1912 came to the High Court in revision against the order, dated the 18th of December, 1911, but never appealed against the decree, dated the 13th of February, 1912.

Mr *A. E Ryves*, for the applicant

*Civil Revision No. 34 of 1912

(1) (1892) I. L. R., 16 Bom., 35 (2) (1903) I. L. R. 26 Mad., 604

Mr *A H C Hamilton* and Munshi *Benode Behari*, for the opposite party

KARAMAT HUSAIN, J —The plaintiff, in 1910, sued on a mortgage made by two joint brothers, Bhopal and Bahadur Bhopal, his son Baddari, grandson Harnarain Singh, and nephew Sham Lal, were defendants Baddari was appointed guardian *ad litem* of his minor son Harnarain, and notice was served upon him on the 14th of August, 1910 Bhopal signed it as a witness Notice was not served on Bhopal personally, but the summons was affixed on the door of his house The record does not show if this was deemed by the Munsif to be sufficient service The suit was decreed on the 19th of December, 1910 The decree against Bhopal was *ex parte* An application for an order absolute was made on the 16th of July, 1911 and granted

Bhopal, on the 1st of August, 1911, applied under order IX rule 13, to have the *ex parte* decree set aside stating in the affidavit that on the date on which the case was heard, he was in Allahabad. The Munsif holding that there was sufficient reason for absence set aside the *ex parte* decree on the 18th of December 1911, and made another decree at variance with the *ex parte* decree on the 13th of February, 1912

The decree holder, on the 19th of February, 1912, came to this court in revision against the order dated the 18th of December 1911, but never appealed against the decree dated the 13th of February, 1912

In support of the application it is argued that under order IX, rule 13 corresponding to section 108, Code of Civil Procedure of 1882, a court has power to set aside an *ex parte* decree only when he (the applicant) satisfied the court that the summons was not duly served or that he was prevented by any sufficient cause from appearing when the case was called on for hearing' and as no cause is alleged for absence and nothing on the record to show that summons was not duly served the Munsif had no jurisdiction to set aside the *ex parte* decree The reply of the learned counsel for the other side is that the remedy open to the applicant was to attack the order in appeal from the decree, dated the 13th of February, 1912, and as he allowed it to become final, he could not be heard in revision. He also urges that the result

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of interference would be to set aside a final decree The contention that the Munsif acted without jurisdiction is not an accurate statement of what took place He wrongly considered what was no cause to be a sufficient cause for absence, but did not act without jurisdiction. The order can, therefore not be a fit subject for revision. Assuming that he acted with material irregularity though not without jurisdiction, the remedy of the applicant was to attack the order in appeal from the decree of the 13th of February, 1912 under section 105 Code of Civil Procedure, and as he failed to appeal, he cannot be allowed to come up in revision. In *Farid Ahmad* v *Dulari Bibi* (1) it was held that an order made under section 25, Code of Civil Procedure, transferring a suit in which an appeal would lie from the decree made therein was not subject to revision by the High Court under section 622. In *Sheo Prasad Singh* v *Kastura Kuar* (2) it was remarked that the revisional powers of this court should not be exercised unless as a last resort for an aggrieved litigant. Even when there is a remedy by a fresh suit, there can be no revision See *J J Gause* v *Jairaj* (3) Regarding this case KNOX J in *Debi Das* v *Ejaz Husain* (4) said —"Ordinarily I am prepared to subscribe to that but in this matter each case must be judged upon the circumstances peculiar to it.

I adopt the following remarks in *Moti Lal Kashibhai* v *Nana* (5) substituting section 115 for section 622 and section 105 for section 591 —'An application under section 622 cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies a remedy is supplied by section 591 which provides that they may be made a ground of objection in the appeal against final decree The purpose with which section 622 was passed was to enable a party to a suit to get rid of a decision or order of a lower court rectified by the High Court where there would otherwise be no remedy

There is however, a conflict of opinion as to whether an order setting aside an *ex parte* decree is or is not attackable in appeal from a final decree. A Bench of the Calcutta High Court held that it is not and that only such orders are within the purview of the

(1) (1884) I. L. R. 6 All., 233
(2) (1888) I. L. R., 10 All., 119
(3) (1893) I. L. R., 15 All., 405
(4) (1905) I. L. R., 28 All., 72
(5) (1892) I. L. R. 18 Bom., 85

section as are "affecting the decision of the case" *with reference to its merits* *Chintamony Dassi* v *Raghoonath Sahoo* (1) and *Krishna Chandra Goldar* v *Mohesh Chandra Saha* (2) According to that court the order can be reversed under section 622, Code of Civil Procedure of 1882—section 115, Code of Civil Procedure of 1908—if the requirements of the section are satisfied *Mahomed Hamidulla* v *Tohurennissa Bibi* (3) A Bench of the Madras High Court in *Gopala Chetti* v *Subbier* (4) has taken the opposite view, holding that an order setting aside an *ex parte* decree could be attacked in appeal from the final decree With due respect to the learned Judges who decided the cases reported in I L R, 22 Calc, 981 and 9 C W N, 584 I agree with the learned Judges who decided the case I L R, 26 Mad, 604 There were no words in section 622, Code of Civil Procedure of 1882, nor are there any in section 115, Code of Civil Procedure of 1908 limiting the right of attack to such orders only as are "affecting the decision of the case *with reference to its merits*, and in the absence of any such limitation a court has no power to read such a limitation into the section

The contention that in order to destroy the right to apply for revision, some other remedy must exist on the date on which the order sought to be revised is made has no force All interlocutory orders which can be attacked in appeals from final decrees under section 105 are always passed before the final decree, and if the contention was right all orders which might be attacked in appeal from the final decree would furnish grounds for applications in revision and the object for which the section is enacted would be defeated.

For the above reasons I would reject the application

KNOX J—I agree in rejecting the application Sufficient ground has not been shown for interference

BY THE COURT—The application is rejected with costs

Application rejected

(1) (1895) I L R 22 Calc 981
(2) (1905) 9 C W N 584
(3) (1897) I L R 25 Calc 1 5
(4) (1903) I L R 26 Mad 604

1912
June 10

APPELLATE CIVIL

Before Mr Justice Karamat Husain and Mr Justice Tudball

ALI HUSAIN (DECREE HOLDER) *v* AMIN ULLAH (JUDGEMENT DEBTOR)*

Pre-emption—Conditional decree—Decretal amount deposited in court—Decree enhanced in appeal—Additional payment made not covering amount withdrawn as costs

A successful plaintiff pre emptor deposited in court the amount of the decree in his favour but subsequently withdrew therefrom the amount of the costs decreed in his favour on the amount payable being enhanced on appeal he paid into Court the difference between the original and appellate decrees *Held* that the decree had been fully complied with *Gopal Saran* v *Ihri* (1) *Balmukand* v *Pancham* (2) *Parmanand Raot* v *Gobardhan Sahai* (3) and *Bechai Singh* v *Shami Nath* (4) followed.

The facts of this case were as follows —

This was a suit for pre emption The pre emptor succeeded in his suit The first court ordered him to deposit Rs 6,800 He carried out the order of the court Subsequently, in execution of his own decree for costs, he attached and received from the Court a sum of Rs 314-8 0 out of the amount deposited by him. There was an appeal in the pre emption suit to the High Court, and the Court modified the decree of the first court by ordering the pre-emptor to pay a sum of Rs 10 000, instead of Rs 6 800 He deposited in compliance with this order an extra sum of Rs 3,200 This deposit was made in time The judgement debtor took objection to this deposit on the ground that it was not a compliance with the order of the High Court, inasmuch as the decree-holder had taken out the sum of Rs 314-8-0 out of the sum previously deposited by him. The court below disallowed the objection. The judgement-debtor appealed to the High Court

Dr *Tej Bahadur Sapru*, for the appellant

The Hon ble Dr *Sundar Lal* and Maulvi *Shafi uz zaman*, for the respondent.

KARAMAT HUSAIN and TUDBALL JJ —The pre-emptor succeeded in his suit for pre-emption The first court ordered him to deposit Rs 6,800 He carried out the order of the court Subsequently, in execution of his own decree for costs, he attached and

*First Appeal No. 180 of 1912 from a decree of Murari Lal, Officiating Subordinate Judge of Cawnpore dated the 18th of September 1911

(1) (1884) I L. R., 6 All., 351
(2) (1888) I L. R. 10 All., 400
(3) (1903) I L. R. 23 All., 678.
(4) (1910) 8 A. L. J., Notes p 27

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got a sum of Rs 314 8 0, out of the sum deposited by him There was an appeal in the pre emption suit to this Court and this Court modified the decree of the first court by ordering the pre-emptor to pay a sum of Rs 10 000, instead of Rs 6,800 He deposited in compliance with the order of this Court an extra sum of Rs 3 200 This deposit was made in time The judgement-debtor took objection to this deposit on the ground that it was not a compliance with the order of the High Court inasmuch as the decree-holder had taken out the sum of Rs 314 8 0 out of the sum previously deposited by him The court below disallowed the objection. Hence this appeal There is a series of decisions of this Court, see *Ishri* v *Gopal Saran* (1) *Balmukand* v *Pancham* (2) *Parmanand Raot* v *Gobardhan Sahai* (2), and *Bechai Singh* v *Shami Nath* (3) In all these cases it has been ruled that such a deposit as was made by the pre-emptor in this case, was a complete compliance with the order of the court Mr Justice TYRRELL in *Balmukand* v *Pancham* no doubt, took a different view But we are bound to follow the other rulings of this Court with which we ourselves agree The appeal fails and is dismissed with costs

Appeal dismissed

REVISIONAL CRIMINAL

1912
June 24

Before Mr Justice Chamier

EMPEROR v ABBU SINGH AND OTHERS*

Act No III of 1867 (Public Gambling Act) section 5—Jurisdiction—Power to issue search warrant— Officer invested with the full powers of a Magistrate —Sub-divisional officer issuing warrant for search outside his sub division.

Held that a search warrant issued under section 5 of the Public Gambling Act 1867, by a first class magistrate was not invalid by reason of the fact that the house to be searched was situated outside the limits of the tahsils in respect of which such magistrate had been appointed sub-divisional officer

This was an application for revision of an order convicting and sentencing the applicants under sections 3 and 4 of the Public Gambling Act 1867 The only point taken in revision was that

* Criminal Revision No 358 of 1912 from an order of H Dupernex Sessions Judge of Farrukhabad dated the 13th of April 1912

(1) (1888) I L R 10 All 400 (2) (1906) I L. R., 28 All., 676

(3) (1910) 8 A L J Notes p 27

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the warrant under which the suspected house had been searched was issued by a sub divisional officer, and the house in question was outside the limits of his sub division It was therefore contended that the magistrate, who was a magistrate of the first class, had no jurisdiction to issue the warrant

Mr *W Wallach*, for the applicants

The Assistant Government Advocate (Mr *R Malcomson*), for the Crown

CHAMIER, J—The applicants have been convicted under sections 3 and 4 of the Public Gambling Act, 1867 The only point taken in revision is that the warrant under which the police searched the house of the first applicant was issued by a magistrate who was not competent to issue it, and, therefore, the discovery of instruments of gaming in the house did not give rise to the presumption that the house was a 'common gaming house' as defined in the Act Section 5 of the Act provides that a search warrant may be issued by the Magistrate of the District or 'other officer invested with the full powers of a magistrate This expression means a magistrate of the first class,—see section 3 (?) of the Code of Criminal Procedure The warrant in the present case was issued by M Muhammad Shafi Khan, a magistrate of the first class in the Farrukhabad district In November last, he was appointed to be sub-divisional officer of two tahsils in the district The house searched is not in either of those tahsils and it is on this account that the warrant is said to be illegal It appears to me that there is no force in the contention. The officer in question was a magistrate of the first class with jurisdiction extending throughout the district when he was appointed to be a sub-divisional officer The appointment gave him certain additional powers in the area of which he became sub-divisional officer, but did not deprive him of all his powers as a magistrate A Sub-divisional Magistrate exercises magisterial powers in matters which do not concern his sub-division, and I find nothing in the Code which suggests that this practice is contrary to law It is true as pointed out by counsel for the appellants that some of the ordinary powers of a magistrate of the first or second class, who has been appointed to be a sub-divisional officer, cannot be exercised by him except in cases arising in his sub-division or

transferred to him by higher authority, but that is on account of the nature of those powers There are other powers which any magistrate can exercise anywhere in the district for example, the power to command an unlawful assembly to disperse or the power to record a confession All that section 5 of the Public Gambling Act requires is that the search warrant shall be issued by the magistrate of a district or a magistrate of the first class It is impossible to hold that the magistrate who issued the warrant in the present case was not a magistrate of the first class The application is rejected

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Application rejected

APPELLATE CIVIL

1912
June 26

Before Mr Justice Karamat Husain and Mr Justice Tudball

GAJADHAR TELI (PLAINTIFF) v BHAGWANTA AND ANOTHER (DEFENDANTS) *

Mortgage—Prior and subsequent mortgages—Suit for sale on second mortgage first mortgagees being made parties—Rights of first mortgagees not set up—Subsequent suit by first mortgagees barred—Res judicata—Civil Procedure Code (1908) *section* 11

Certain puisne mortgagees brought a suit for sale on their mortgage in which although they impleaded the prior mortgagees they simply asked for the sale of the property mortgaged neither claiming to have their mortgage redeemed nor asking for sale subject to the prior mortgage The prior mortgagees on their part did not set up their rights under the prior mortgage *Held* that section 11 of the Code of Civil Procedure was a bar to the prior mortgagees afterwards suing for sale on their mortgage *Mahomed Ibrahim Hossain Khan* v *Ambika Pershad Singh* (1) followed *Surji Ram Marwari* v *Barhamdeo Prasad* (2) distinguished

The facts of this case are fully stated in the judgement of the court

Babu *Surendra Nath Sen*, for the appellant

Maulvi *Ghulam Mujtaba*, for the respondents

KARAMAT HUSAIN and TUDBALL JJ —The facts of the case out of which this appeal has arisen are as follows —On the 20th of June, 1885, Husain Ali and Jawwad Husain mortgaged 6 bighas, 1 biswa and 18 dhurs of zamindari to Radhe and Chirkil

* Second Appeal No 962 of 1911 from a decree of Rama Das Additional Subordinate Judge of Azamgarh dated the 20th of July 1911 modifying a decree of Raghunath Prasad City Munsif of Azamgarh dated the 19th of December 1910

(1) (1912) I L R 39 Calc., 527 (2) (1905) 1 C L J 337

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On the 19th of January, 1889, Husain Ali sold 3 bighas, 19 dhurs out of the same to Abid and Shafi, a part of the sale consideration being left with the vendees to pay off the mortgage (which they failed to do)

On the same date, Abid and Shafi and their two brothers, Nadir and Yusuf, mortgaged several properties to Mahadeo Prasad Among these was the 3 bighas 19 dhurs, zamindari purchased by Abid and Shafi alone On the 4th of January, 1890, Radhe and Chirkil sold their mortgagee rights under the deed of the 20th of June, 1885 to Nadir In 1897, Mahadeo Prasad brought a suit for sale on his mortgage Nadir was then dead and in his place Ashraf and Musharraf, his sons, were impleaded as his heirs

An examination of the plaint shows that Mahadeo Prasad, among other reliefs, asked for sale of the 3 bighas, 19 dhurs zamindari in default of payment He did not seek to sell it subject to the prior mortgage He sought the sale of the property, plain and simple and made no mention of the prior mortgage Ashraf and Musharraf, though they were parties to the suit, did not put forward their prior mortgage and did not claim either to have their mortgage redeemed or to have the property sold subject to that mortgage

Mahadeo Prasad s suit was decreed, and this property was sold and purchased by the decree holder It was not sold subject to the mortgage On the 15th of October, 1909, Ashraf and Musharraf sold their rights as mortgagees to Gajadhar Teli, who therefore brought the present suit for sale of the 6 bighas 1 biswa, 12 dhurs which were mortgaged under the deed of 1885 Mahadeo Prasad being dead his heirs Musammat Bhagwanta and Musammat Basanta have been impleaded as the purchasers of the 3 bighas 19 dhurs Among other defences they pleaded that the claim of the mortgagee for the sale of this 3 bighas, 19 dhurs, was barred by the rule of *res judicata* They urged that as Ashraf and Musharraf were parties to the suit by Mahadeo Prasad they might and ought to have put forward the mortgage of 1885 in defence of Mahadeo Prasad s claim for sale of the property in question, and that having failed to do so they or their transferee cannot now enforce the mortgage against that property

The court of first instance held against them on the ground that the heirs of Nadir Ali were only impleaded in Mahadeo Prasad's suit as mortgagors and not also as prior mortgagees

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The two ladies appealed and the lower appellate court held in their favour and dismissed the suit as against them and the 3 bighas, 19 dhurs

The plaintiff comes here on second appeal and urges that the decision of the first court was correct The question is, whether the heirs of Nadir Ali in the suit of Mahadeo Prasad not only might but also ought to have put forward their prior mortgage in defence to the claim of Mahadeo Prasad to put the property to sale in satisfaction of his debt As we have already pointed out, Mahadeo Prasad did not admit the prior mortgage and seek to sell the property subject thereto

A prior mortgagee no doubt, is not a necessary party to a suit wherein a puisne mortgagee seeks to sell the property subject to the prior mortgage but in the present case though the prior mortgagee was impleaded as a mortgagor of other properties, he was actually a party to the suit and was aware of the fact that the mortgagee Mahadeo Prasad was seeking to sell the property without the burden of the prior mortgage upon it

In our opinion in these circumstances, they ought to have put forward their prior mortgage in defence of the claim

A large number of rulings have been called to our attention The majority do not assist us The principle however to be found in the decision of their Lordships of the Privy Council in *Mahomed Ibrahim Hossain Khan* v *Ambika Pershad Singh* (1) is clearly applicable

In that case a mortgagee was made a defendant to a suit on a mortgage prior to his own He omitted to set up his rights under his mortgage and also under another which was prior to the one sued on and which he had paid off

It was held that a suit subsequently brought by him to enforce those rights was barred under the Code of Civil Procedure (Act XIV of 1882, section 13, Expl II) The case of *Surji Ram Marwari* v *Barhamdeo Persad* (2) is distinguishable The judgement of MOOKERJEE J, at the bottom of page 349 runs as follows —

The appellants in that suit sought not to redeem any prior

(1) (1912) I. L. R 39 Calc 527 (2) (1905) 1 C L. J 337

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encumbrances but merely to sell the property subject to all prior charges"

In the case before us, Mahadeo Prasad did not in his suit seek to sell the property subject to any prior charges It is true that the heirs of Nadir Ali were impleaded as mortgagors under the deed of Mahadeo Prasad but they were parties to the suit Admittedly, they might have pleaded their prior mortgage in defence, and, in our opinion, when they saw that Mahadeo Prasad was seeking to sell this property without regard to the prior mortgage, they ought to have pleaded their rights under the deed of 1885 Not having done so, the present suit is barred under the terms of section 11, Civil Procedure Code

The appeal, therefore, fails and is dismissed with costs

Appeal dismissed

REVISIONAL CRIMINAL

1912
June 27

Before Mr Justice Karamat Husain and Mr Justice Tudball

CHADAMMI *v* LALTA PRASAD AND ANOTHER

Criminal Procedure Code sections 195 476—Sanction to prosecute—Sanction set aside by superior court and order for prosecution under section 476 substituted—Jurisdiction

Held that a court hearing an application under section 195 of the Code of Criminal Procedure to revoke sanction for a prosecution granted by a subordinate court has jurisdiction to set aside the order of the subordinate court and direct a prosecution under section 476 of the Code *In the matter of the petition of Mathura Das* (1) overruled

In this case sanction to prosecute one Chadammi for offences under sections 193 and 211 of the Indian Penal Code was granted by a magistrate to Lalta Prasad and another Chadammi applied under section 195 of the Code of Criminal Procedure to the Assistant Sessions Judge to revoke the sanction so granted. The Assistant Sessions Judge revoked the sanction, but taking action under section 476 of the Code, directed the prosecution of Chadammi and sent the record to the District Magistrate with the request that the complaint might be made over to a competent magistrate for disposal according to law Against this order Chadammi applied in revision to the High Court.

Criminal Revision No 341 of 1912 from an order of F C. Allen Sessions Judge of Mainpuri dated the 4th of May 1912

(1) (1893) I L R 16 All 80

Mr *E A Howard* for the applicant 1912

The Assistant Government Advocate (Mr *R Malcomson*), for the Crown CHADAMMI v. LALTA PRASAD

KARAMAT HUSAIN and TUDBALL, JJ —In this case sanction for prosecution under sections 193 and 211 Indian Penal Code was granted by a Magistrate and the Assistant Sessions Judge on revision revoked the sanction, but taking action under section 476 of the Code of Criminal Procedure directed the prosecution of the applicant and sent the record to the District Magistrate with the request that the complaint be made over to a competent Magistrate for disposal according to law The applicant comes here in revision, and his learned counsel urges that the learned Sessions Judge had no jurisdiction to take action under section 476 of the Code of Criminal Procedure In support of this contention he relies upon the case *In the matter of the petition of Mathura Das* (1) The case, no doubt, supports the contention In that case a learned Judge of this Court was of opinion that when a matter is taken up in revision to a higher court under section 195 of the Code of Criminal Procedure the proceedings in the higher court cannot be deemed to be judicial proceedings The learned Judge who decided that case in the course of his judgement said —' It is evident that the offences were not committed in the court of the District Judge so that he has no jurisdiction under section 476 unless it can be held that they were brought under his notice in the course of a judicial proceeding Even if an application under section 195 can be held to be a judicial proceeding, I do not think it could be held without straining the language of the section that when an application is presented for sanction to prosecute for an offence that offence is brought to the notice of the court in the course of a judicial proceeding there being no other judicial proceeding before the court than the application for sanction Taking this view of the case, I am of opinion that the District Judge had no power to take action under that section With due respect to the learned Judge we are of opinion that when a case under section 195 of the Code of Criminal Procedure is taken up to a higher court in revision the proceedings in the higher court relating to sanction are undoubtedly judicial proceedings These proceedings in no way, can be regarded as other than judicial

(1) (1892) I L R 16 All 80

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proceedings The function exercised by the higher court in upholding the order of the court below or reversing it is beyond doubt a judicial act Besides, it seems highly improbable that the higher court when a case under section 195 of the Code of Criminal Procedure comes before it in revision should not have the power to rectify the mistake, if any committed by the court below There are many cases in which the sanction for prosecution obtained by an applicant from the court of first instance is not utilized for the benefit of the public It is often used as the means of gaining some private object, and that being so, it is highly desirable that the higher court should take away that power from the hands of a private person and give it to the public authorities or institute the complaint itself This being our view we are of opinion that the learned Sessions Judge had jurisdiction to take action under section 476 of the Code of Criminal Procedure, because the offence was brought to his notice in the course of a judicial proceeding We therefore, reject the application.

Application rejected

1910 *July*

APPELLATE CIVIL

Before Mr Justice Chamier and Mr Justice Muhammad Rafiq

ABDUL AZIZ (PLAINTIFF) v BASDEO SINGH AND OTHERS (DEFENDANTS)*

Land holder and tenant—Fixed rate tenant—Liability of fixed rate tenants for rent joint and several and not joint merely—Act No IX of 1872 (Indian Contract Act) section 43

Held that liability of joint holders of a fixed rate tenancy to payment of rent is joint and several, and not joint only The failure therefore of the plaintiff in a suit for rent against several fixed rate tenants jointly to bring upon the record the representatives of a deceased defendant is no bar to the continuance of the suit against the remaining defendants *Joy Gobind Law v Monmotha Nath Banerji* (1) followed *Muhammad Askari v Radhe Ram Singh* (2) referred to.

This was a suit for the recovery of rent brought against several joint holders of a fixed rate tenancy The suit was dismissed by the court of first instance. The plaintiff appealed to

* Second Appeal No 911 of 1911 from a decree of J H Cuming District Judge of Jaunpur dated the 17th of December 1910 confirming a decree of Mahesh Lal Dikshit Assistant Collector first class of Jaunpur dated the 17th of May 1909

(1) (1906) I L R, 33 Calc 580 (2) (1900) I L R 22 All 307

the District Judge, and during the pendency of the appeal one of the defendants respondents died. The plaintiff appellant failed to apply to the court within the prescribed time to bring on the record the legal representatives of the deceased respondent. The court then held that the appeal was not maintainable against the remaining respondents and accordingly dismissed it. The plaintiff appealed to the High Court.

Mr. *W. K. Porter*, Babu *Surendra Nath Sen* and Maulvi *Muhammad Ishaq*, for the appellant.

Mr. *A. H. C. Hamilton* Mr. *A. L. Ryves*, Babu *Satya Chandra Mukerji* and Dr. *Satish Chandra Banerji*, for the respondents.

CHAMIER and MUHAMMAD RAFIQ, JJ. —This appeal arises out of a suit brought against several persons for the rent of a fixed rate holding. The suit was dismissed by the court of first instance, and the plaintiff appealed to the District Judge. While the appeal was pending one of the defendants respondents died and the plaintiff appellant failed to apply to the court within the prescribed time to make his heirs respondents in his place. The court then held that the appeal was not maintainable against the remaining respondents and with reference to a prayer that the court should consider the case under section 5 of the Limitation Act the court held that that section did not apply to the appeal. The result was that the appeal was dismissed. This is a second appeal by the plaintiff on whose behalf it is contended (1) that the liability of the defendants to the suit was joint and several and not joint only and therefore the appeal should have been allowed to proceed against the surviving respondents, (2) that section 5 of the Limitation Act applied to the case. On the first point the case seems to be covered by the decision of the Calcutta High Court in *Joy Gobind Laha* v. *Monmotha Nath Banerji* (1). That was a suit against several persons for the recovery of the rent of a holding. After an appeal had been filed by the plaintiff, one of the defendants respondents died and no attempt was made by the appellant to get the legal representatives of the deceased respondent substituted on the record. The remaining respondents objected that the appeal could not proceed. The court held that as the liability of the holders of the tenure was joint

(1) (1905) I. L. R., 33 Calc. 580

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and several, the appeal could proceed against the surviving respondents, and that it abated only as far as the deceased respondent was concerned There seems to be no reason for distinguishing between the liability of several holders of a fixed rate tenure and the liability of several tenants of any other holding The liability of fixed rate tenants in respect of the rent of their holding appears to be joint and several The case is, therefore, on all fours with the case decided by the Calcutta High Court In this connection we may refer to the case of *Muhammad Askari* v *Radhe Ram Singh* (1) where the court held that the effect of of section 43 of the Indian Contract Act was to exclude the right of a joint contractor to be sued along with his co-contractors We allow this appeal, set aside the decree of the lower appellate court and remand the case to that court to be restored to the pending file and disposed off according to law Costs in this Court will be costs in the cause

Appeal decreed—Cause remanded

Before Mr Justice Chamier and Mr Justice Piggott

1912
July 4

JUGAL KISHORE SAHU AND ANOTHER (PLAINTIFFS) v KEDAR NATH AND ANOTHER (DEFENDANTS)*

Mortgage—Prior and subsequent mortgagees—Release of part of mortgaged property for less than its value—Suit for recovery of entire balance of mortgage debt from the residue of the mortgaged property

Held that a first mortgagee cannot be allowed to release part of the mortgaged property for less than its due proportion of the mortgage money and then claim a decree against the mortgagor and a puisne mortgagee for the recovery of the whole of the balance of the mortgage money out of the remainder of the property *Mir Eusuff Ali Haji* v *Panchanan Chatterjee* (2) *Hari Kissen Bhagat* v *Velait Hossein* (3) and *Ponnusami Mudaliar* v *Srinivasa Naicken* (4) referred to.

The facts of this case were as follows —

This was a suit upon a mortgage made in January 1885 in favour of the predecessor of the appellants The mortgage covered shares in several villages including a two anna share in a village called Haria In May, 1895 the mortgagors sold

* Second Appeal No 1159 of 1911 from a decree of F D Simpson District Judge of Gorakhpur dated the 3rd of August 1911 reversing a decree of Harbandhan Lal Additional Subordinate Judge of Gorakhpur dated the 2 th of March 1911

(1) (1900) I L. R. 22 All 307 (2) (1910) 15 C. W N., 600
(3) (1903) I L. R., 30 Calc 755 (4) (1908) I L. R., 31 Mad., 333

a one anna six pie share in Haria to one Asuda Bibi, leaving with her Rs. 500 part of the purchase money to be paid to the appellants. That sum was paid to the appellants in July 1896 and a receipt was given by them which shows that they accepted the money in reduction of the amount due on the mortgage. In 1906 the appellants released the one anna six pie share from the mortgage stating that they did so in consideration of the payment made to them in 1896. In the present suit instituted in 1910, the appellants claim to be entitled to bring the remainder of the mortgaged property to sale for the recovery of the whole amount remaining due upon the mortgage after giving credit for the sum of Rs. 500 paid in 1896. The principal defence to the suit was that of certain puisne mortgagees who had taken a mortgage of the property in September 1895. They said that the share sold to Asuda Bibi was roughly speaking half the mortgaged property in value and that the appellants were entitled to proceed against the remainder of the mortgaged property for only so much of the mortgage money as was rateably due from it.

The court of first instance (Additional Subordinate Judge of Gorakhpur) decreed the claim in full. On appeal the District Judge sustained the defence set up and granted a decree to the plaintiffs for an amount proportionate to the value of the property not released by them. The plaintiffs appealed to the High Court.

Babu *Jogindro Nath Chaudhri* and Dr. *Satish Chandra Banerji*, for the appellants.

Mr. *M. L. Agarwala* and Munshi *Govind Prasad*, for the respondents.

CHAMIER and PIGGOTT, JJ.:—This was a suit upon a mortgage made in January 1888 in favour of the predecessor of the appellants. The mortgage covered shares in several villages including a two anna share in a village called Haria. In May 1895 the mortgagors sold a one anna six pie share in Haria to one Asuda Bibi, leaving with her Rs. 500 part of the purchase money to be paid to the appellants. That sum was paid to the appellants in July 1896 and a receipt was given by them which shows that they accepted the money in reduction of the amount due on the mortgage. In 1906, the appellants released the one anna six pie share from the mortgage stating that they did so in consideration of the payment made to them in 1896. In the present suit

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JUGAL KISHORE SAHU *v* KEDAR NATH

instituted in 1910 the appellants claim to be entitled to bring the remainder of the mortgaged property to sale for the recovery of the whole amount remaining due upon the mortgage, after giving credit for the sum of Rs 500 paid in 1896 The only defence with which we are concerned now is that of the respondents who took a mortgage of the property in September, 1895 They said that the share sold to Asuda Bibi was, roughly speaking, half the mortgaged property in value and that the appellants were entitled to proceed against the remainder of the mortgaged property for only so much of the mortgage money as was rateably due from it The Subordinate Judge rejected this defence and decreed the claim in full but on appeal the District Judge held that the defence was well founded and he gave the appellants a decree for an amount proportionate to the value of the property not released by them. The Subordinate Judge had relied upon the decisions of this Court in *Jai Gobind* v *Jas Ram* (1) and *Sheo Tahal Ojha* v *Sheodan Rai* (2) The District Judge followed the decisions of the Calcutta High Court in *Hari Kissen Bhagat* v *Veljat Hossein* (3) and the Madras High Court in *Ponnusami Mudaliar* v *Srinivasa Naickan* (4) and he distinguished the other cases on the ground that in them the mortgagee had merely refrained from proceeding against part of the mortgaged property, whereas in the present case the appellant had definitely released part of the property from the mortgage, and he held that the release had the same effect as a purchase of that part by the appellants would have had

In second appeal the appellants contend that the case is covered by the decisions of this Court mentioned above and also by the decision in *Sheo Prasad* v *Behari Lal* (5), *Ghafur Hasan Khan* v *Muhammad Kifait ullah* (6) and *Parbhu Narain Singh* v *Amir Singh* (7) and that we should follow those cases in preference to the decisions of the Calcutta and Madras High Courts.

In the Calcutta and Madras cases the mortgagee had released part of the mortgaged property from the mortgage in favour of a person who had purchased that part from the mortgagor and it was assumed in the Calcutta case and decided in the Madras case

(1) Weekly Notes 1893 p 180
(2) (1905) I L R, 28 All, 174
(3) (1903) I L R 30 Calc, 755
(4) (1908) I L R, 31 Mad, 334
(5) (1901) I L R, 23 All, 79
(6) (1901) I L R 23 All, 17
(7) (1907) I L R, 29 All, 309

that the mortgagee was bound to abate a part of the mortgage money proportionate to the value of the property released and could only recover the balance from the property not released. With the possible exception of the case of *Jai Gobind* v. *Jas Ram* (1) the cases in this Court which have been referred to do not in any way touch the question which we have to decide. In *Sheo Prasad* v. *Behari Lal* (2) the mortgagee had asked for and obtained a decree for sale of part only of the mortgaged property. It was held that he was entitled to a decree under section 90 of the Transfer of Property Act after bringing that part to sale. The only defendant to the suit was the mortgagor. In *Ghafur Hasan Khan* v. *Muhammad Kifayat-ullah Khan* (3) a mortgagee obtained a decree *nisi* for sale of the whole of the mortgaged property, but took an order absolute for sale of a part only of it. It was held that after bringing that part to sale he was entitled to a decree under section 90 of the Transfer of Property Act. These two cases obviously have no bearing upon the present case. In *Sheo Tahal Ojha* v. *Sheodan Rai* (4) part of the mortgaged property was found to belong to persons who had not joined in the mortgage and the mortgagee withdrew his claim against that part. It was held that a mortgagee suing for sale of part of the mortgaged property was not bound to implead the persons interested in the remainder of the property. In that case there were no puisne mortgagees or subsequent purchasers from the mortgagors. RICHARDS, J. pointed out that the effect of a release by the mortgagee of one of the mortgagors and of his share of the property behind the backs of the other mortgagors was not in question. It seems to us that that case also has no bearing upon the present case. In *Pirbhu Narain Singh* v. *Amir Singh* (5) a mortgagee obtained a decree for sale of the whole of the mortgaged property. After he had brought part of it to sale it was discovered that the remainder was not saleable being an occupancy holding. It was held that the mortgagee was entitled nevertheless to a decree under section 90 of the Transfer of Property Act. That case in no way affects the present case. In *Jai Gobind* v. *Jas Ram* (6) a mortgagee sued his two mortgagors A and B and a puisne mortgagee

(1) Weekly Notes 1898 p. 1 0
(2) (1902) I. L. R. 25 All. 79
(3) 1905) I. L. R. 28 All., 79
(4) (1905) I. L. R. 28 All. 174
(5) (1907) I. L. R. 29 All. 309
(6) Weekly Notes, 1898 p. 130

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JUGAL KISHORE SAHU v. KEDAR NATH

from B, for sale of the whole of the mortgaged property, but at the hearing he asked for a decree against the share of A only. It was held that he was entitled to a decree for the whole of the mortgage money against the share of A. That case is distinguishable from the present case, for in this case the plaintiff mortgagee has definitely released part of the property from the mortgage, whereas in that case the plaintiff merely abstained from asking for relief against part of the property, and if the defendant A redeemed the plaintiff's mortgage there was nothing to prevent him from claiming contribution from B's share of the property.

While mortgaged property remains in the hands of the mortgagor the mortgagee may enforce his mortgage against any part of the property, and so long as there are no other persons interested in the property, the mortgagee may, as between himself and the mortgagor, release any part of the property from the mortgage. But when an estate subject to a mortgage belongs to or subsequently becomes the property of several co-sharers and one of those persons pays off the debt, he can call upon the other co-sharers to contribute rateably out of their shares to the payment of the debt, and when, after a mortgage has been made, another person purchases or takes in mortgage part of the property, the prior mortgagee cannot even with the consent of the mortgagor release any part of the property from the first mortgage to the prejudice of that person, that is to say, notwithstanding the release the part released remains liable to contribute rateably to the payment of the mortgage debt.

The question is whether a mortgagee who releases part of the property from the mortgage without receiving from the releasee his proper share of the mortgage money, can, in a suit against a subsequent purchaser or mortgagee, obtain a decree against the rest of the mortgaged property for the balance of the mortgage money. The Calcutta and Madras High Courts hold that he cannot do so against purchasers of the property. Their view appears to be that the right to contribution between several properties rests upon the principle of subrogation. In the recent case of *Mir I...* *H... Panchanan Chatterjee* (1) the Calcutta High Court quoted with approval the following statement of the law from an American case (2):— "While the whole of the debt is secured by the whole

(1) (1910) 1 C. W. L. 602.   (2) *Brooks v. Benham* 66 Am. St. Rep. 87.

of the land, each parcel of the land as between the different properties is equitably subject to so much of the debt as corresponds to the proportion between its value and the value of all the land and if its owner should be compelled to redeem the mortgage, he can resort to the others for a contribution, and for that purpose is entitled to the benefit of subrogation to the mortgage title To release any particular parcel from the mortgage encumbrance is to make as respects that any subrogation impossible The mortgagee therefore releases at his peril if he had notice of the conveyance out of which the equities arise, and if he does so without receiving from the releasee his proper contributory share of the debt, he is still chargeable with the residue of that share in favour of the owners of the remaining parcels Whether this view is correct or not, it seems clear that a mortgagee cannot release part of the mortgaged property for less than its proportion of the mortgage debt and then sue the mortgagor and a puisne mortgagee for the whole of the balance of the mortgage money Under section 74 of the Transfer of Property Act a puisne mortgagee is entitled to redeem the next prior mortgagee as soon as the amount due on that mortgage has become payable, and when he has done so, he acquires all the rights and powers of the prior mortgagee as such In England in a suit by a prior mortgagee against the mortgagor and puisne mortgagees the decree may provide for the exercise by the puisne mortgagees of their successive rights of redemption or for working out the rights of the parties in the event of any puisne mortgagee in front of the mortgagor redeeming the mortgaged property A form for this purpose is to be found in Seton on Decrees, Volume 5th Edition p 1641 6th Edition p 1979 and was recommended for use in India by their Lordships of the Privy Council in the case of *Gopi Narain Khanna* v *Bansidhar* (1) It has not hitherto been the practice for courts in these Provinces to make such decrees, probably because there was till recently no form prescribed for the purpose but such a form has been provided in Appendix D to the first schedule to the Code of Civil Procedure 1908 It is clear therefore that a puisne mortgagee may in a suit by a prior mortgagee be given not only the right to redeem the prior mortgage but the right when he has done so, to go on and enforce his own and the prior mortgage against the property The

(1) (1905) I. L. R., 27 All., 325

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JUGAL KISHORE SAHU v. KEDAR NATH

puisne mortgagee might be seriously prejudiced if the prior mortgagee had released part of the property from his mortgage for less than its due proportion of the mortgage money and had nevertheless obtained a decree for the whole of the balance due on the mortgage.

It seems to us that the decisions of the Calcutta and Madras High Courts cited above are correct, and that whether they are correct or not a first mortgagee cannot be allowed to release part of the mortgaged property for less than its due proportion of the mortgage money and then claim a decree against the mortgagor and a puisne mortgagee for the recovery of the whole of the balance of the mortgage money out of the remainder of the property. It may be suggested that this should be the rule only where the mortgagee has notice of the puisne mortgage when he gives the release. It is unnecessary to consider this, for there is no question that the appellants had notice or must be deemed to have had notice of the puisne mortgages when they gave the release. In our opinion the decision of the District Judge is correct. We dismiss this appeal with costs.

Appeal dismissed.

1912
July 12

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

HABIB ULLAH KHAN AND ANOTHER (DEFENDANTS) v. LALTA PRASAD AND ANOTHER (PLAINTIFFS).*

Civil Procedure Code (1908), order XLI rule 23—Remand—Finding that burden of proof has been wrongly laid without finding that the decision of the first court is wrong.

It is not a good ground for passing an order of remand under order XLI rule 23, of the Code of Civil Procedure to say that the preliminary issue has been decided by the court of first instance on a wrong view of the burden of proof unless the appellate court also finds that that decision is wrong.

THIS was a suit for possession of certain alluvial land, the question at issue being whether the land accrued to a certain village as a whole so as to become the property of the zamindars (the plaintiffs) or whether it accrued specially to certain *muafi* land of the defendants. The court of first instance held that the plaintiffs were bound to prove their possession within limitation in respect of this land and finding that they had failed to do so

* First Appeal No. 63 of 1912, from an order of I. B. Mundle, Additional Judge of Bareilly, dated the 1st of March 1912.

dismissed the suit on this ground only In appeal the Additional District Judge did not determine whether the suit was or was not barred by limitation but on the finding that the court of first instance had laid the burden of proof on the wrong party decreed the appeal and remanded the suit under order XLI rule 23 of the Code of Civil Procedure From this order of remand the defendants appealed to the High Court

Mr *B E O'Conor*, for the appellants

Mr *J M Banerji* (for Dr *Satish Chandra Banerji*), for the respondents

MUHAMMAD RAFIQ and PIGGOTT JJ —The plaintiffs in this case are the proprietors of village Bakhshpur in the Pilibhit district, and the defendants are the holders of certain *muafi* lands situated within the same village It appears that the *muafi* lands held by the defendants are on the boundary of the village at a point where it is subject to fluvial action by the Khakhra river The real dispute between the parties is whether certain land accreted to village Bakhshpur by alluvion through the action of the Khakhra river at this point, accrues to the *muafi* lands of the defendants and becomes a part of their *muafi* holding or accrues to the village of Bakhshpur as a whole and becomes a portion of the village lands of which the plaintiffs are proprietors This was the first point raised by the pleadings The defendants further pleaded that the plaintiff's suit was barred by limitation as they had never been in possession within 12 years of the institution of the suit of any portion of the land claimed The court of first instance held that the plaintiffs were bound to prove their possession within limitation in respect of this land and finding that they had failed to do this, dismissed the suit on the issue of limitation only On appeal the learned Additional Judge has neither held that the suit is barred by limitation nor that it is not so barred He says that the court of first instance has mislaid the burden of proof and that it was for the defendants to show that they had been in possession for more than 12 years before the institution of the suit On this he has decreed the plaintiffs appeal and remanded the case under order XLI rule 23 of the Code of Civil Procedure for disposal on the merits the effect of his order is to put the parties in a difficulty as it is open to question whether the learned Munsif accepting the directions of the lower appellate court regarding the burden of

1912

HABIB-UL-LAH KHAN v. LALTA PRASAD

proof, could still find that the suit is barred by limitation In an case, it is not a good ground for passing an order of remand unde order XLI, rule 23 to say that the preliminary issue has bee decided by the court of first instance on a wrong view of the burde of proof, unless the appellate court also finds that that decisio was wrong Regarding this question of the burden of proof w have heard both parties, and we think it desirable to make one or two remarks The suit as framed was undoubtedly one to which article 142 of the first schedule of the Indian Limitation (Act No VIII of 1908) would apply, and the learned Munsif was right in saying that on the suit thus framed, it lies on the plaintiffs to prove both title and possession within limitation. We think, however that the first court did not fully realize the sort of evidence which might, perhaps, have been sufficient to discharge the burden of proof laid on the plaintiff in this matter If the suit is to be disposed of on the limitation issue alone without any finding on the question of title (and we are not sure that this is, in fact a suitable way of disposing of the present case), that issue will have to be disposed of on the assumption that the plaintiffs are right and the defendants are wrong on the issue of title Looking at the case in this way, it could be open to the plaintiffs to prove that the land in suit had accrued by alluvion within limitation, or that although it had accreted more than 12 years before the institution of the suit it had remained within the limitation period, waste or jungle land in respect of which the presumption would arise that possession went with title The law on this point is laid down in *Jagadindra Nath Rai v Hemanta Kumari Devi* (1) We may remark on this point that the evidence of the settlement papers as to actual possession does not seem to have been considered at all by the lower appellate court, there is a presumption that the possession of the parties was correctly shown in those records until the contrary is proved.

We set aside the order of the Additional Judge and direct that court to readmit the appeal to its file of pending cases and dispose of it according to law, with due regard to the remarks made in this order If the lower appellate court is of opinion that the case cannot be disposed of on the question of limitation without a finding on some other issue it will of course be open to it to exercise

(1) (1912) 8 A. L. J. 1176

its powers under order XLI rule 25 of the Code of Civil Procedure But the case should not be remanded under rule XXIII of that order unless the finding on the question of limitation is definitely reversed. Costs here and hitherto will abide the event

Appeal allowed—Cause remanded

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

1912 *July 15*

KRISHNA JIVA TEWARI AND OTHERS (DEFENDANTS) v BISHNATH KALWAR AND OTHERS (PLAINTIFFS)

Act No I of 1872 (Indian Evidence Act) section 69—Proof of document—Document required by law to be attested—Death of attesting witnesses—Hindu law—Joint Hindu family—Parties

On execution of a deed of mortgage the names of two out of the four attesting witnesses were written by the scribe who also signed the document himself *Held* that it being necessary to prove the deed of mortgage after the death of all the attesting witnesses and the scribe it was sufficient to prove the handwriting of the scribe *Radha Kishen* v *Fateh Ali Ram* (1) referred to

Where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit *Hori Lal* v *Munman Kunwar* (2) and *Nathu Lal* v *Lala* (3) referred to

The plaintiffs in this case sued as heirs of the original mortgagee of a mortgage executed on the 9th of August, 1883, for sale of the mortgaged property The defendants were the representatives of the original mortgagors, who were four out of five brothers, members of a joint Hindu family and certain subsequent transferees The court of first instance (Subordinate Judge of Ghazipur) decreed the plaintiffs claim, exempting however, a one fifth share from the operation of the decree The defendants appealed, but their appeal was dismissed by the District Judge Some of the defendants then appealed to the High Court

Mr *Muhammad Ishaq Khan* and Babu *Surendra Nath Sen*, for the appellants

Mr *M L Agarwala* and Munshi *Gobind Prasad*, for the respondents

MUHAMMAD RAFIQ and PIGGOTT, JJ —This was a suit for sale upon a mortgage of August the 9th, 1883, brought by the heirs

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Second Appeal No 1175 of 1911 from a decree of Sri Lal District Judge of Ghazipur dated the 28th of June 1911 modifying a decree of Chajju Mal Subordinate Judge of Ghazipur dated the 17th of March 1911.

(1) (1898) I L R., 20 All 532. (2) (1912) I L R. 34 All. 549 (3) (1912) I L R. 34 All. 572

1912

HABIB UL-LAH KHAN v LALTA PRASAD

proof, could still find that the suit is barred by limitation In any case, it is not a good ground for passing an order of remand under order XLI, rule 23 to say that the preliminary issue has been decided by the court of first instance on a wrong view of the burden of proof, unless the appellate court also finds that that decision was wrong Regarding this question of the burden of proof we have heard both parties, and we think it desirable to make one or two remarks The suit as framed was undoubtedly one to which article 142 of the first schedule of the Indian Limitation (Act No VIII of 1908) would apply, and the learned Munsif was right in saying that on the suit thus framed, it lies on the plaintiffs to prove both title and possession within limitation. We think, however, that the first court did not fully realize the sort of evidence which might, perhaps, have been sufficient to discharge the burden of proof laid on the plaintiff in this matter If the suit is to be disposed of on the limitation issue alone without any finding on the question of title (and we are not sure that this is, in fact, a suitable way of disposing of the present case), that issue will have to be disposed of on the assumption that the plaintiffs are right and the defendants are wrong on the issue of title Looking at the case in this way it could be open to the plaintiffs to prove that the land in suit had accrued by alluvion within limitation or that although it had accreted more than 12 years before the institution of the suit it had remained within the limitation period, waste or jungle land, in respect of which the presumption would arise that possession went with title The law on this point is laid down in *Jagadindra Nath Rai* v *Hemanta Kumari Devi* (1) We may remark on this point that the evidence of the settlement papers as to actual possession does not seem to have been considered at all by the lower appellate court there is a presumption that the possession of the parties was correctly shown in those records until the contrary is proved

We set aside the order of the Additional Judge and direct that court to readmit the appeal to its file of pending cases and dispose of it according to law, with due regard to the remarks made in this order If the lower appellate court is of opinion that the case cannot be disposed of on the question of limitation without a finding on some other issue it will, of course be open to it to exercise

(1) (1912) 8 A L J 1176

its powers under order XLI rule 25, of the Code of Civil Procedure But the case should not be remanded under rule XXIII of that order unless the finding on the question of limitation is definitely reversed Costs here and hitherto will abide the event

Appeal allowed—Cause remanded

1912

HABIB ULLAH KHAN *v* LALTA PRASAD

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott

1912 *July 15*

KRISHNA JIVA TEWARI AND OTHERS (DEFENDANTS) *v* BISHNATH KALWAR AND OTHERS (PLAINTIFFS)

Act No I of 1872 (Indian Evidence Act) section 69—Proof of document—Document required by law to be attested—Death of attesting witnesses—Hindu law—Joint Hindu family—Parties

On execution of a deed of mortgage the names of two out of the four attesting witnesses were written by the scribe who also signed the document himself *Held* that it being necessary to prove the deed of mortgage after the death of all the attesting witnesses and the scribe it was sufficient to prove the handwriting of the scribe *Radha Kishen* v *Fateh Ali Ram* (1) referred to

Where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit *Hori Lal* v *Munman Kunwar* (2) and *Nathu Lal* v *Lala* (3) referred to

The plaintiffs in this case sued as heirs of the original mortgagee of a mortgage executed on the 9th of August, 1883, for sale of the mortgaged property The defendants were the representatives of the original mortgagors who were four out of five brothers members of a joint Hindu family and certain subsequent transferees The court of first instance (Subordinate Judge of Ghazipur) decreed the plaintiffs claim exempting, however, a one fifth share from the operation of the decree The defendants appealed, but their appeal was dismissed by the District Judge Some of the defendants then appealed to the High Court.

Mr *Muhammad Ishaq Khan* and Babu *Surendro Nath Sen*, for the appellants

Mr *M L Agarwala* and Munshi *Gobind Prasad*, for the respondents

MUHAMMAD RAFIQ and PIGGOTT JJ —This was a suit for sale upon a mortgage of August the 9th, 1883 brought by the heirs

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Second Appeal No 1175 of 1911 from a decree of Sri Lal District Judge of Ghazipur dated the 28th of June 1911 modifying a decree of Chajju Mal, Subordinate Judge of Ghazipur dated the 17th of March, 1911

(1) (1899) I L R, 20 All, 532 (2) (1912) I L R, 34 All, 549

(3) (1912) I L R, 34 All, 572

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and representatives of the original mortgagee against the heirs and representatives of the four mortgagors, together with some subsequent transferees The Court of first instance decreed the plaintiffs' claim, exempting a one fifth share in the property originally mortgaged from the operation of the decree An appeal by the defendants was dismissed by the District Judge of Ghazipur Coming to this Court in second appeal, the defendants, or rather six defendants out of a large number who were impleaded in the court of first instance have raised substantially five points For convenience sake, we deal with them in the order in which they were raised The first point taken is that the evidence on the record is not legally sufficient to prove the execution of the deed in suit, regard being had to the provisions of section 59 of the Transfer of Property Act, No IV of 1882, and sections 68 and 69 of the Indian Evidence Act, No I of 1872 This point was not taken in the court of first instance and there was nothing in the memorandum of appeal in the lower appellate court to warn the plaintiffs that objection was being taken to the technical sufficiency of their evidence The deed in suit purports to be signed by four marginal witnesses, of whom two are literate and two are illiterate The scribe of the deed has signed his own name at the foot, and has written the names of the two illiterate witnesses The plaintiffs produced one witness to prove execution of the deed in suit by the mortgagors, who has been accepted as a reliable witness by the courts below, and we must hold that his deposition sufficiently meets the requirements of section 69 of the Evidence Act so far as concerns proof of the signatures of the executants There is evidence that all the marginal witnesses and also the scribe are dead and we must presume that this evidence has been accepted by the courts below, as it would have been impossible for them otherwise to hold the document proved. The plaintiffs have proved the handwriting of the scribe, both as regards his own signature at the foot of the deed, and as regards the signatures of the witnesses, Babu Lal and Sundar Rai which are in the handwriting of the said scribe In the case of *Radha Kishen* v *Fateh Ali Ram* (1) it was held by this Court that the scribe of a deed who had signed his name at the foot thereof though no explicitly described as an attesting witness

(1) (1898) I. L. R. 20 All. 532

could give evidence on the same footing as an attesting witness, provided he could prove that the deed was in fact executed in his presence There is a fair presumption to be drawn from the fact that the signatures of two of the attesting witnesses in this case were written by the pen of the scribe that the said scribe was present at the execution of the deed We are of opinion therefore that the requirements of section 69 of the Indian Evidence Act with reference to proving the attestation of at least one attesting witness when all the attesting witnesses are dead have been sufficiently complied with in this case by proof of the handwriting of the scribe and by the fact that two of the attesting witnesses appear to have signed by the pen of the said scribe

The second point taken is the most substantial point in this case The bond in suit was executed by four brothers, Umrao Sheoperson Hari and Gopal It is an admitted fact that at the date of the execution these four were members of a joint undivided Hindu family It is also admitted that there was living at that time a fifth brother, named Bhondu, who was also a member of the joint Hindu family Some evidence has been offered, on behalf of the plaintiffs to prove that Bhondu would have been asked to join in the execution of the deed, but for the accident that he was lying ill at the time The contention for the defendants appellants is that four of the brothers had no right to hypothecate any portion of the joint family property without the authority of the fifth, and that in consequence of Bhondu s not having joined in the execution of this deed the mortgage in suit is not binding even as against the interests of the four mortgagors in the joint family property There are two circumstances in the case which appear to us decisive In the first place the deed in suit was executed for legal necessity namely to pay off an antecedent debt due from the father of the four executants a debt for the payment of which the four mortgagors and their brother, Bhondu were all liable because of their pious duty as Hindu sons In the second place it is to be noticed that the suit as now brought is not against a joint family The joint family has been broken up and the defendants who are the legal representatives of the original mortgagors form a number of separate groups, the members of which are joint amongst themselves but separate from the rest. Without any general discussion of the questions of law that have been argued

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before us, we are content to say that under these circumstances we are satisfied that the mortgage in suit is enforceable at least against the shares of the four executants of the mortgage deed The question whether the courts below were right in exempting Bhondu's one fifth share is not before us, as the plaintiffs never challenged the correctness of the decree of the court on this point

It appears that one of the groups of defendants before us included a father and son and that one Ram Prasad, a minor son of the latter defendant was not impleaded in the suit at all It is contended on behalf of the appellants that this omission is fatal to the entire suit it being conceded that Ram Prasad cannot now be added as a defendant the period of limitation for a suit against him having expired. On the principles laid down by the latest rulings of this Court in *Hori Lal* v *Munman Kunuar* (1) and *Nathu Lal* v *Lala* (2) it appears to us that the courts below were right in holding that the minor Ram Prasad was sufficiently represented in the suit by his father and grandfather We would refer to the remarks of Mr Justice CHAMIER, on page 417 of the report in the second of the rulings above referred to In cases in which all the adult members of a family appeared on the record as plaintiffs, it was held that this alone justified the presumption that they were acting as managers on behalf of themselves and of the minor members of their family who had not joined in the suit We think the same principle applies to the case of defendants

The fourth point taken refers to a payment of Rs 125 admitted in the plaint It is sufficiently met by the fact that the interest claimed in the plaint is simple and not compound and there is nothing in the pleadings or evidence to suggest that this payment of Rs 125 could or ought to have been credited to principal

The fifth point is the last point taken on behalf of the appellants, and it refers to an issue raised in the written statement of Baijnath Rai defendant No 23 The scanty information available on the record makes it difficult for us to understand the precise circumstances on which this plea is based. Baijnath Rai was impleaded in the plaint simply as a subsequent mortgagee no details being given of his mortgage In his written statement

(1) (1912) I L. R 34 All 549 (2) (1912) I L. R. 34 All, 572

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this defendant pleaded that a portion of the property in suit had been hypothecated to one Bija or Bijai Rai under a deed of August the 1st 1886. He added that the said Bijai Rai had brought a suit upon his mortgage in the year 1898 impleading Raja Ram whom he described as the ancestor of the plaintiffs, as a mortgagee subsequent to himself. The contention is that as the said Raja Ram made no defence to that suit the plaintiffs are estopped in the present suit from claiming priority for their mortgage as against that in favour of Bijai Rai. The courts below have contented themselves with remarking that, even if this plea were effective as against Raja Ram, there was nothing to show that Raja Ram represented all the present plaintiffs in that suit of 1898, and that there were still remaining a number of plaintiffs entitled to maintain the suit as brought. So far as we can gather from the materials on the record this finding appears to be correct. There does not seem to be anything on the record to show how the defendant, Baijnath Rai, comes to have any interest in the mortgage in favour of Bijai Rai, or that he was impleaded as defendant because of this mortgage of August 1st 1886. Again, the decree of September the 9th 1898, which is the only evidence on the record on this point, merely shows that Raja Ram was impleaded as son and heir of Amrit Lal and that the suit brought by the plaintiff Bijai Rai was decreed. It does not even show in what capacity Raja Ram was impleaded or what interest he had in the subject-matter of the suit. It is incumbent on a defendant who raises the plea of *res judicata* to lay before the court adequate materials for a full and proper appreciation of that plea and a proper decision thereon. This has certainly not been done in the present case. For these reasons we overrule all the objections taken on behalf of the appellants and dismiss the appeal with costs.

Appeal dismissed.

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PRIVY COUNCIL

SHANKAR DIN AND OTHERS (PLAINTIFFS) v GOKAL PRASAD AND OTHERS (DEFENDANTS)

[On appeal from the Court of the Judicial Commissioner of Oudh at Lucknow]

Mortgage—Redemption—Subsequent agreement qualifying right to redeem—Loss of deed—Onus of proof of terms of mortgage—Act No I of 1869 (Oudh Estates Act) section 6—Limitation—Compromise barring right to redemption

There is nothing in law to prevent the parties to a mortgage from coming to a subsequent arrangement qualifying the right to redeem

In this case the mortgage which it was sought to redeem was dated in 1846 and in 1870 the mortgagors had in consideration of certain additional benefit reserved to them under a compromise agreed to subject their right of redemption to certain conditions The deed having been lost the onus was on the plaintiffs to prove the terms of the mortgage so as to show that the suit was not barred by section 6 of the Oudh Estates Act (I of 1869) [see *Raja Kishen Dutt Ram Panday* v *Narendar Bahadoor Singh* (1)] which onus he was found unable to discharge

Held (affirming the decision of the Judicial Commissioner of Oudh) that the plaintiffs were not in any case entitled to redeem as long as there was no breach by the defendants of the covenants contained in the compromise

Appeal from a judgement and decree (28th July 1908) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (15th May 1907) made on appeal by the Court of the Subordinate Judge of Biswan the latter decree having affirmed a decree (12th December 1906) by the court of the Munsif of Biswan

The main question for decision on the present appeal was whether the appellants were entitled to redeem a mortgage executed on the 12th of July, 1846 by one Ahlad Singh, in favour of one Daryao Singh

The mortgaged properties were the villages of Gathia and Pipri, and the mortgage money was Rs 388 15 0 The plaint alleged that the mortgagor was to retain possession of 250 bighas of land and receive the sum of Rs 87 8 0 annually from the mortgagee who was to have possession of the rest of the villages and appropriate the profits in lieu of interest Redemption was to take place in any year during the fallow season.

The first ten appellants were the representatives of Ahlad Singh the mortgagor, the eleventh appellant was a purchaser

Present—Lord SHAW SIR JOHN EDGE and Mr AMEER ALI

(1) (1876) L R 3 I A 85.

from them On a partition between the descendants of Daryao Singh the mortgagee (whose name was entered in lists 1 and 3 under section 8 of Act I of 1869) the village of Gathia fell to the share of Shankar Bakhsh Singh whose estate was under the management of the Court of Wards The village of Pipri was allotted to Hardeo Bakhsh Singh, and descended to his widow Musammat Ram Kali, by whom it was transferred as a waqf to the President of the Kyastha Scholarship Trust Allahabad (the respondent No 1) The suit was originally brought to redeem both villages, but so far as it related to Gathia it was dismissed in default of sufficient notice to the Court of Wards and the present appeal was confined to the right to redeem the village of Pipri

For the defendant No 6 (respondent No 1) it was admitted that Ahlad Singh had made a possessory mortgage in 1846, but its terms as stated in the plaint were denied The defendants did not however produce the mortgage deed They alleged that it was lost and "not found in spite of search, but they produced no evidence to prove either the loss of the deed, or that any search had ever been made for it It was also pleaded that the suit could not be maintained in consequence of a compromise made on the 7th of January 1870, between the predecessors of the parties at the time of the regular settlement of Oudh The terms of the compromise and the order of the Settlement Commissioner thereon dated the 17th of January 1870 are sufficiently set out in the judgement of their Lordships of the Judicial Committee The 17th paragraph of the written statement of Gokal Prasad (respondent No 1) was—'Plaintiff's claim is barred by limitation and the defendants hold proprietary possession

The Oudh Estates Act (I of 1869) became law on the 12th of January 1869, and under section 6 of that Act the following mortgages only could be redeemed from a taluqdar —"(a) When the instrument of mortgage was executed on or after the 13th of February, 1844, and fixed no term within which the property comprised therein might be redeemed, or (b) When the instrument of mortgage fixed a term within which the property comprised therein might be redeemed and such term did not expire before the 13th of February 1856'

On the pleadings 9 issues were settled by the Munsif, of which only two were material on this appeal namely —(3) "Did Ahlad

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Singh, son of Kirpa Ram, mortgage the villages in suit with possession to Daryao Singh, for Rs 388 15 0 on the 12th of July, 1846, with the conditions given in the plaint,' and (5) "How do the compromise dated the 7th of January, 1870, and the decision of the Settlement Court, dated the 17th of January, 1870 affect the plaintiffs' claim ? "

On these issues the Munsif held on the oral evidence that the execution of the mortgage was proved and that its terms were as stated in the plaint He was of opinion that the proceedings taken at the settlement did not bar redemption, and he made a decree for redemption of the one village of Pipri

The Subordinate Judge on appeal decided that the oral evidence produced by the plaintiffs and accepted by the Munsif was valueless to prove the mortgage or its terms but that from the documentary evidence he was satisfied that the mortgage referred to in the compromise was that which the plaintiffs now sought to redeem, and that under the circumstances, and on the inferences to be drawn from the non production of the mortgage deed by the defendants the presumption was in favour of the plaintiffs right to redeem He therefore agreed with the Munsif that the settlement proceedings were no obstacle to the maintenance of the suit As to these holdings he said —

'It is urged before me that as the plaintiffs have failed to prove that the mortgage-deed fixed no term within which the property comprised therein might be redeemed or that if it fixed such a term it did not expire before the 13th of February 1856 no decree could be passed in plaintiffs favour The learned counsel Mr Lincoln who argued the case on behalf of the plaintiffs before me did not protest against the contention b ing raised That contention seems to have been raised before the court below at the time of argument The learned Munsif allowed it to be raised and disposed of it. But that contention does not appear to have been raised in the pleadings The only pleas that might be said to embody the above contention are the plea of limitation and another plea that the plaintiffs have no *locus standi* I do not think that the said pleas cover the contention above referred to The plaintiffs never stated in their plaint that the mortgage deed in suit fixed any term. What they said was that, according to the conditions of the mortgage deed the mortgage was redeemable in any fallow season It does not amount to the fixation of a term within the meaning of section 6 of the Oudh Estates Act The mere denial by the defendant No 6 of the conditions of the mortgage-deed does not amount to the raising of a plea that by the mortgage-deed in suit a term for redemption was fixed and that it expired before the 13th of February 1856

After referring to the case of *Raja Kishen Dutt Ram Panday v Narendar Bahadoor Singh* (1) and distinguishing it from the present, the Subordinate Judge continued —

I do not think the authority noted above is applicable to this case If the defendant No 6 wanted to raise a plea under section 6 of the Oudh Estates Act he should have pleaded expressly that the term fixed for redemption in the mortgage deed expired before the 13th of February 1856 This plea does not arise by the mere denial of the averment that no term for redemption was fixed in the deed However if the pleadings in the case be so construed as to raise the aforesaid plea the authority of their Lordships of the Privy Council in the case noted above will be fatal to the plaintiffs case But as I have distinguished the case noted above from the one before me I think the plaintiffs are entitled to redeem. Every mortgage is in its nature redeemable and its redemption is barred either by act of the parties or by force of law It is not for a plaintiff mortgagor to prove in absence of any plea that no conceivable acts of the parties have rendered the mortgage incapable of redemption or that there is no law which stands in the way of redemption '

The appeal was accordingly dismissed with costs The respondent No 1 appealed to the Court of the Judicial Commissioner, (Mr L G EVANS, Additional Judicial Commissioner, and Mr T C PIGGOTT, officiating Second Additional Judicial Commissioner), who reversed the decisions of the lower courts

The material part of their judgement was as follows —

In this appeal the following points have to be decided —

First whether the plaintiffs have proved the terms of the mortgage-deed as set forth by them in their plaint and secondly if the terms are not proved whether there is anything in the compromises alluded to above, which would enable the plaintiffs to redeem the mortgage having regard to the provisions of section 6 of Act I of 1869

With reference to the first point the learned Subordinate Judge discussed the evidence produced on behalf of the plaintiffs and found that the oral evidence as to the contents of the mortgage deed was wholly insufficient and worthless As to the documentary evidence he discussed the terms of the compromises noted above He was satisfied that they did refer to the mortgage-deed which the plaintiffs seek to redeem but he remarked that he was unable to ascertain its terms and that the plaintiffs had failed to prove what they were

Upon this point the case of *Raja Kishen Dutt Ram Panday v Narendar Bahadoor Singh* (1) is the only authority In that case it was held that the burden of proof lay upon the plaintiff to substantiate his case by evidence. But regard must be had *to the opportunities* which each *party may* naturally be supposed to have of giving evidence and although the burden of proof *primâ facie* in this case in their Lordships view is upon the plaintiffs, still they think that the consideration should not be omitted that the defendant would naturally have the mortgage and that it would be *primâ facie* at all

(1) (1876) L. R. 3 I. A., 85

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events more in his power to give accurate evidence of its contents than in that of the plaintiff. In this particular case it is necessary to consider what trustworthy evidence has been produced by the plaintiffs. I concur entirely with the learned Subordinate Judge in his opinion as to the oral evidence produced by them. He regarded it as worthless and has given good reasons for his decision. I have perused the evidence and have come to the same conclusion.

The other evidence as to the terms of the mortgage deed consists of the compromises of 1870 which are admitted by the parties. It is true that these compromises give details of the land held by the ancestors of the plaintiffs and the annual sum payable to them by the defendants' predecessors and in the plaint these details are given as one of the conditions under which the property is mortgaged. Under section 61 of the Evidence Act the contents of a document can only be proved by *primary* or *secondary* evidence. The plaintiffs are unable to produce *secondary* evidence of the contents of the mortgage deed within the meaning of section 63 of the Evidence Act and I am compelled to find that the plaintiffs have failed to produce any legal evidence which is admissible as to the terms of the mortgage they seek to redeem. Therefore as the plaintiffs are unable to give any *primâ facie* proof that the mortgage is redeemable it must be held that they cannot succeed unless they can show that there is anything in the terms of the compromises of 1870 which would entitle them to a decree for redemption. It might be urged that the predecessors of the defendants admitted in the compromises that the mortgage was redeemable and that that admission was made one year after Act I of 1869 was passed when all the taluqdars knew perfectly well that mortgages executed after the 13th of February, 1844 could only be redeemed if they came within the meaning of section 6 of the Act. But I am unable to find that any admission made by a mortgagee would operate as to make a mortgage redeemable which *by law* was irredeemable at the time when the admission was made. The plaintiffs have failed to discharge the burden laid on them of proving that the mortgage can now be redeemed and I hold that the subsequent agreement of 1870 cannot operate so as to extend a period of limitation which had already expired according to the special law provided for cases of this kind in Act I of 1869. All that I find established from the compromises of 1870 is that the parties agreed that no action should be taken by the mortgagors so long as they are retained in possession of certain lands assigned to them in under proprietary tenure. If their possession was disturbed they were entitled to take action under their mortgage-deed of 1846. It is not pretended that the defendant (No. 6) or his predecessors have broken the terms of the compromises and therefore the plaintiffs according to the strict terms of the compromise have no right to enforce the mortgage of 1846. If they now insist upon their legal right as mortgagees to institute a suit for redemption independently of the terms of the compromises, they have to show by evidence which is legally admissible that the mortgage is redeemable. This they have failed to show and I hold that the claim for redemption should have been dismissed.

The appeal was consequently allowed and the suit dismissed with costs.

On this appeal by the plaintiffs

De Gruyther, K C and *Ross* for the appellants contended that having regard to the special circumstances of the case the terms of the mortgage were sufficiently proved to enable the appellants to redeem

The respondent, it was submitted in whose possession the mortgage had all along been should if it were lost as he alleged, have produced some evidence of the loss, and that a search had been made for it, but no such evidence was given The case of *Kishen Dutt Ram* v *Narendar Bahadur Singh* (1) was distinguishable from the present case It was held by the Judicial Commissioner that the mortgage was not redeemable in consequence of the provisions of section 6 of the Oudh Estates Act (I of 1869) No plea however, raising that defence was taken in the pleadings the only plea that could possibly include it was paragraph 17 of the respondents written statement as to limitation, which did not cover the point and it therefore ought not to have been allowed to be raised on appeal No term was fixed in the mortgage for redemption As to the compromises of 1870 it was contended that they did not operate as an agreement under which the right of redemption could not be exercised and did not bar the right of redemption The onus was on the respondent and he had not discharged it Reference was made to the Oudh Estates Act (I of 1869), sections 3, 4 5 and 6 Sykes Taluqdari Law, page 168, and the Commentaries on the Transfer of Property Act (IV of 1882) by Shephard and Brown (7th edition) section 6 note 1

Sir Erle Richards K C and *B Dube* for the respondent contended that the appellants had failed to prove the terms of the mortgage or to show that the mortgage was still subsisting and was redeemable For 42 years no claim had been put forward by the appellants to the property At the time of the compromises in 1870 there was no right of redemption which could have been enforced. The right of redemption could only be exercised on the conditions in the compromises and on no other The onus had been rightly placed on the appellants

De Gruyther, K C, replied.

(1) (1876) L. R. 3 I A 85

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1912, July 18th —The judgement of their Lordships wa vered by Mr AMEER ALI —

The sole question for determination in this appeal is w the plaintiffs are entitled in this action to a decree for re tion in respect of certain property mortgaged so long ago a by their ancestor, Ahlad Singh to one Daryao Singh, who defendants represent

The suit was brought in the Court of the Munsif of I in the Province of Oudh in respect of two villages Pipi Gathia This officer dismissed the claim in respect of Gath failure on the part of the plaintiffs to serve sufficient notice Court of Wards, who held the village for one of the defend but he made a decree for redemption in respect of Pipri, a decision was affirmed on the appeal of the defendants by the S dinate Judge On second appeal to the Court of the Ju Commissioner of Oudh this decree has been reversed and th dismissed with costs The present proceedings refer only to

The plaintiffs have appealed to His Majesty in Council their main contention before this Board is that, having rega the admitted position of the parties as mortgagors and mortga the learned Judges have taken a wrong view of their rel rights

In the view their Lordships take of the case they do not it necessary to set out at any length the facts on which the pa proceeded to trial It is not disputed that in 1846, Ahlad S mortgaged the two villages in question to Daryao Singh and since then the mortgagee and his representatives have be possession As the transaction took place ten years befor annexation of Oudh it came within the purview of the Estates Act of 1869, section 6 of which imposed certain restri on the right of redemption in respect of properties held b taluqdars on mortgage

The plaintiffs were naturally unable to produce the d mortgage, and the defendants would not produce it on the g that it was lost. The onus was thus cast on the plaintiffs to that they had, in view of section 6 of the Oudh Estates Ac right to redeem. To discharge this burden and to prov contract as stated by them in their plaint they relied in p

certain oral evidence and in part on proceedings *inter partes* which took place in 1870 in the course of settlement disputes regarding the lands of which they were in possession under the terms of the mortgage in question In the course of those proceedings certain *razinamahs* or deeds of compromise were entered into between the parties and filed in the court of the Extra Assistant Commissioner, who, on the 17th of January 1870 made the following order —"With the consent of the parties the Court decrees the claim subject to the conditions set forth in the *razinamahs* These documents clearly show that, although the right of redemption was admitted as subsisting it was subjected to certain conditions The plaintiffs right to the possession of the lands and to the enjoyment of the annuity reserved to them under the deed of 1846 together with various other rights, were admitted, some further lands were conceded and then followed an important covenant which in the document executed by the plaintiffs ancestors is in these terms

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Should Anant Singh or any of his descendants resume the under proprietary tenure then we the executants may at first obtain a decree in respect of the said proprietary tenure

Should they even after the decree fail to deliver possession then we the executants and our heirs shall be at liberty to take back the villages Pipri and Gathia according to the terms of the deed executed by Ahlad Singh and others in favour of Thakur Daryao Singh after compliance with the said terms

The same covenant in almost identical language is to be found in the deed of compromise executed by the persons who then represented the mortgagee They say as follows —

Whenever they convert the same into an agricultural land they should pay rent therefor Wherefore we with our own volition do record that neither we nor our heirs shall generation after generation resume the under proprietary land. And in case we or our heirs resume the same the said Madho Singh and others may by suing in Court obtain a decree

If we fail to deliver the land after such a decree then Madho Singh and others and their heirs shall be competent to take back recover the villages of Pipri and Gathia after complying with the provision of the deed executed by Ahlad Singh and others in favour of Thakur Daryao Singh our deceased father

In their Lordships judgement the arrangement arrived at in 1870 is conclusive as regards the present action Whatever may have been the mortgagor s right under the deed of 1846 the parties deliberately came to a settlement in 1870 by which his representatives for certain additional benefit reserved to them under the *razinamahs*, agreed to subject their right of redemption

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to certain conditions There is nothing in law to prevent the parties to a mortgage from coming to any arrangement afterwards qualifying the right to redeem In the present case it is not alleged that the action is brought upon a breach of the covenant contained in the deed of compromise Their Lordships are therefore of opinion that the suit was rightly dismissed by the Judicial Commissioners, and they will humbly advise His Majesty to dismiss this appeal with costs

Appeal dismissed

Solicitors for the appellants —*T L Wilson & Co*

Solicitors for the respondent No 1—*Barrow, Rogers, & Nevill*

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July 17

APPELLATE CIVIL

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott.

SRI CHAND (DECREE HOLDER) v MURARI LAL (JUDGEMENT DEBTOR *

Act No III of 1907 (Provincial Insolvency Act) sections 16 and 34—Execution of decree against the insolvent during pendency of insolvency proceedings—Right of decree holder in respect of proceeds of property attached and sold and money attached before order of adjudication

Whilst proceedings in insolvency under the Provincial Insolvency Act, 1907 were pending certain immovable property of the insolvent was attached and sold in execution of a decree against him and the proceeds deposited in court for the benefit of the decree-holder The decree-holder also attached certain moneys which had been paid into court to the credit of the insolvent but up to the date of the order of adjudication had taken no further steps to possess himself thereof *Held* that the decree-holder was entitled as against the receiver to the benefit of the proceeds of execution of his own decree, but not to the money of the insolvent which he had attached. *Peacock* v *Madan Gopal* (1) followed

The facts of this case were as follows —

Ram Saran Das and two others were on an application by one of their creditors dated the 21st of February, 1911, adjudged insolvents on the 1st of February, 1912 The appellant Sri Chand was one of the creditors and was made a party to the insolvency proceedings In execution of a decree which Sri Chand had obtained against the persons adjudged insolvents, he attached in November 1911 a sum of Rs 1 139 12 3 which was in deposit in the court of the Subordinate Judge to the credit of those persons, and, further

* First Appeal No 79 of 1912 from an order of Sushil Chandra Banerji Officiating Second Additional Judge of Meerut dated the 29th of March, 1912

(1) (1902) I. L. R. 29 Calc., 428

caused a house of theirs to be sold by auction, the sale proceeds of which were deposited in court to his credit in January, 1912. At the date of the order of adjudication namely the 1st of February, 1912 both these sums of money remained unpaid to Sri Chand. He applied, on the 6th of March 1912, for payment of these sums to himself, claiming under section 34 (1) of the Provincial Insolvency Act priority over the receiver. The application was refused. From the order of refusal he appealed to the High Court.

Mr. *M. L. Agarwala*, for the appellant:—

Sri Chand has priority over the receiver in respect of the two sums. There was nothing to prevent him from executing his decree and realizing the money for himself as long as the order of adjudication was not passed. Both the sums are assets "realized," within the meaning of section 34 (1), before the date of the order of adjudication. As to the item of Rs. 1,139-12-3, as soon as Sri Chand attached the money, it became payable to him and could be said to have been "realized." Upon the attachment the court had no option but to make it over to him; the writing of a formal order being, therefore, only a mechanical act, its absence is immaterial. When the money was attached it came to be at my disposal and ceased to be the property of the judgement debtors. Decree holders attaching subsequently to the receipt of the money by the court which ordered the first attachment cannot claim contribution; *Srinivasa Ayyangar* v. *Seetharamayyar* (1). The words "assets realized" were also used in section 295 of the old Code of Civil Procedure. The meaning of the word "realized" as used there was explained in *Manilal Umedram* v. *Nanabhai Maneklal* (2). The money was in deposit in the court of the Subordinate Judge; it was attached by an order of the court of the Second Additional Subordinate Judge, and as soon as it was received by the latter court it became an asset "realized." I also rely on the case of *Debi Prasad* v. *O. M. Chiene* (3). Similarly, as regards the sale proceeds of the house, as soon as the money was paid into court, it became an asset realized, although it was not actually paid over to Sri Chand. The ruling relied on by the lower court in *Frederick Peacock* v. *Madan Gopal* (4) is clearly distinguishable. There the property had been attached but not

(1) (1895) I. L. R. 19 Mad. 73.
(2) (1904) I. L. R. 28 Bom., 264.
(3) (1912) 9 A. L. J., 707.
(4) (1902) I. L. R. 29 Calc. 428.

1912

SRI CHAND v. MURARI LAL

sold prior to the order of adjudication and appointment of a receiver

The respondent (receiver) was not represented

MUHAMMAD RAFIQ and PIGGOTT, JJ —In this case, the appellant, Sri Chand, held a decree against one Murari Lal Proceedings to have this judgement debtor declared insolvent were pending from the 21st of February, 1911, to the 1st of February, 1912 Sri Chand as one of the creditors, had notice of these proceedings While, however, they were going on he took an opportunity to continue executing his decree, and we can find nothing in law to prevent him from doing so, up to the date when an order of adjudication was passed. He attached certain immovable property of his judgement-debtor and got it put up to sale, and the sale proceeds were deposited in court in the month of January, 1912 We think he was entitled to the money so deposited, and the order of the court below to the contrary was wrong The deposit was for the benefit of the decree holder It was not the property of the judgement debtor which could vest in the court or in the official receiver under the provisions of section 16, clause (2) of the Provincial Insolvency Act and it also came within the definition of the assets realized in the course of execution within the meaning of section 34 of the same Act We think, however, that the order of the court below was right and the appeal should not be allowed in respect of another item of Rs 1,139 12 3 This seems to have been the surplus proceeds of a sale of some other property of Murari Lal s in execution of some other decree In the month of November, 1911, it was lying to the credit of Murari Lal in the court of the Subordinate Judge of Meerut. Sri Chand applied to the court executing his decree to attach this money for his benefit, and obtained an order of attachment. But nothing further had been done before the order of adjudication against Murari Lal was passed. There had been no order under rule 8 of order XXI Code of Civil Procedure vesting the money so attached in the decree-holder It was, therefore, the property of the insolvent on the date on which the order of adjudication was passed and so vested in the insolvency court and became divisible among the creditors. We are not prepared to hold that section 34 of the Provincial Insolvency Act gives the appellant Sri Chand any

special claim in respect of this money It may have been, and no doubt was, realized in the course of the execution of the other decree, in the execution of which the sale took place, but it was attached by Sri Chand simply as movable property belonging to his judgement debtor in the hands of the court of the Subordinate Judge. It was, therefore, subject to the provisions of the Code which deal with the satisfaction of a decree by attachment of movable property We think the ruling relied on by the court below in *Frederick Peacock* v *Madan Gopal* (1) is in point and should govern our decision. We, accordingly, allow this appeal only to this extent, that we set aside the order of the court below as regards the sale proceeds deposited in the court of the Second Additional Subordinate Judge of Meerut in the month of January, 1912, as proceeds of the auction sale held in execution of Sri Chand's own decree The money thus deposited, Sri Chand is entitled to realize and to apply to the satisfaction of his decree

We dismiss the appeal as regards the attached item of Rs 1,139 12 3 holding that the court below was right in directing this sum to be realized for the benefit of the creditors in insolvency The appellant will get his proportionate costs

Appeal allowed in part

1912
July 19

Before Sir Henry Richard Knight Chief Justice and Mr Justice Tudball

ISHRI PRASAD (DEFENDANT) v GOPI NATH AND OTHERS (PLAINTIFFS)*

Act No III of 1877 (Indian Registration Act) section 50—Registration—Mortgage—Priority between registered and unregistered deeds

Property which was the subject of two unregistered mortgages of different dates was sold in execution of a decree on the later of the two mortgages and purchased by the decree holder who afterwards sold it by an unregistered deed to Bal Kishan who in turn sold it by a registered deed without making any mention of the prior unregistered mortgage. *Held* that after such sale no suit would lie on the prior unregistered mortgage *Sobhagchand Gulalchand* v *Bhaichand* (2) *Baldeo Prasad* v *Baldeo* (3) and *Ram Lal* v *Thakur Bachcha Singh* (4) referred to

The facts of this case were as follows —

Shib Lal and others executed a simple mortgage on the 21st of August, 1894, in favour of Gopi Nath and others by means of an unregistered deed. Subsequent to that date the same mortgagors

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* Appeal No. 84 of 1912 under section 10 of the Letters Patent

(1) (1902) I L R. 29 Calc. 428.　(2) (1882) I L R., 6 Bom. 193
(3) Weekly Notes 1901, p 112　(4) (1912) 10 A L J., 114

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ISHRI PRASAD v. GOPI NATH

executed another simple mortgage by means of an unregistered deed on the 30th of May, 1896, in favour of Bindraban Bindraban sued upon his mortgage, and in execution of his mortgage decree purchased the property He on the 10th of March 1910, by an unregistered deed of sale sold the property to Bal Kishan, and Bal Kishan subsequently by a registered deed of sale sold the property to Ishri Prasad, the defendant The deed of sale purported to transfer the property free of all incumbrances The plaintiffs brought the present suit to enforce their mortgage of the 21st of August, 1894, and impleaded Ishri Prasad as defendant Ishri Prasad pleaded that because he had purchased the property from Bal Kishan by a registered deed of sale, he was entitled to priority under section 50 of the Registration Act The lower appellate Court held that he was not entitled to priority and decreed the plaintiff's claim. On second appeal the decree was confirmed by a single Judge of the High Court in the following judgement —

"In my judgement there is no force in this appeal The suit which has given rise to it was brought by the respondents for sale upon a mortgage, dated the 21st of August 1894 for Rs 99 executed by Ram Bakhsh and others On the 30th of May 1896 the same mortgagors mortgaged the same property to one Bindraban Both the mortgage deeds were unregistered Bindraban brought a suit for sale upon his own mortgage and in execution of the decree obtained by him sold the mortgaged property and bought it himself. His son sold it to one Bal Kishan whose heir sold it to Ishri Prasad defendant on the 7th of April, 1910 This sale-deed was registered. Ishri Prasad claims that by reason of his sale deed being registered he has priority over the plaintiff by virtue of the provisions of section 50 of the Registration Act In my opinion the lower appellate court has rightly overruled his plea The mortgage in favour of Bindraban was a mortgage of such rights as existed in the mortgagor after the execution of the prior mortgage in favour of the plaintiffs It is these rights which Bindraban brought to sale in execution of his decree and it is these rights only which passed to him under his auction purchase Ishri Prasad under his purchase has acquired only such rights as Bindraban and his successors in title possessed. Therefore Ishri Prasad has only acquired the rights of the mortgagors which existed in them after the execution of the mortgage deed in favour of the plaintiffs that is to say the equity of redemption of the mortgagors That being so, Ishri Prasad cannot claim that he has acquired the property mortgaged to the plaintiffs that is the entire property and that he can ignore the mortgage in the plaintiffs' favour His sale-deed and the mortgage of the plaintiffs do not in reality cover the same property and therefore section 50 cannot apply to a case like this. The principle of the decision of the Bombay High Court in *Sobhagchand Gulabchand* v *Bhaichand* (1) does not apply to the present case. I dismiss the appeal with costs.

(1) (1882) I. L. R., 6 Bom., 193.

The defendant appealed under section 10 of the Letters Patent

Babu *Sital Prasad Ghosh*, for the appellant —

The defendant is entitled to priority under section 50 of the Registration Act because his document refers to the same property over which the plaintiffs held a mortgage The plaintiffs' mortgage deed being unregistered would be postponed to the defendant s title deed which is a registered document It is immaterial to inquire into the title of Bal Kishan or of his predecessor in title because the Legislature has clearly enacted that a subsequent registered document will have priority over a prior unregistered document dealing with the same property To take a simple illustration —If A makes a mortgage by an unregistered deed and then makes a mortgage of the same property by a registered deed, strictly speaking the interest conveyed by the second mortgage would be only the equity of redemption which was left, but yet it cannot be argued that section 50 would not help the subsequent mortgagee His document by virtue of its being registered will have priority over the first unregistered deed It makes absolutely no difference in principle if there is not a common transferor in both cases The policy of the Registration Act is to place a premium on registration, and if parties fail to have recourse to the provisions of that Act they cannot complain if they afterwards find that their title deed has to be postponed to others which, though subsequent in date, have been registered

Babu *Piari Lal Banerji* (for Babu *Durga Charan Banerji*) for the respondent —

It could not have been the intention of the Legislature in enacting section 50 to do away with all inquiry into the title which could be conveyed by means of a registered deed In the present instance it is quite clear that the defendant s original predecessor in title Bindraban could only have acquired at the auction sale the right title, and interest of the judgement-debtor at the date of the sale, i e, the property subject to the plaintiff's prior mortgage His title could not be enlarged by any subsequent act of his His transferee Bal Kishan therefore acquired by the sale in his favour the same rights as Bindraban had acquired at the auction sale and Bal Kishan in his turn, could only have transferred the interest which he had himself acquired. He could not by simply registering

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ISHRI PRASAD v. GOPI NATH

his deed of transfer amplify the *quantum* of his estate, and the defendant therefore, could not possibly be deemed to have acquired any larger interest than Bindraban originally had, and that interest was admittedly inferior to the plaintiff's title, as it was the purchase of a subordinate interest subject to the plaintiffs' prior interest. It is an elementary principle of law that no one can give a better title than he himself has, and the analogy suggested by the appellant cannot be pushed so far as to include a case like the present. Section 50 will only apply where the two deeds are antagonistic to each other, in other words, where it is impossible to give effect to one without destroying the other. I rely on *Sobhagchand Gulabchand* v. *Bhaichand* (1).

Babu *Sital Prasad Ghosh* not heard in reply.

RICHARDS, C. J., and TUDBALL, J.—The facts of this case are as follows:—

Ram Bakhsh and others mortgaged certain property to the present respondents on the 21st of August, 1894. On the 30th of May, 1896, they mortgaged the same property to Bindraban. Both mortgage deeds were unregistered. Bindraban brought a suit for sale on his mortgage and purchased the property himself in execution of his decree. His son sold the property to Bal Kishan. The latter's heir sold it to Ishri Prasad, the present appellant. It must be clearly noted here that though Bindraban purchased at the auction sale the right, title and interest of his mortgagors, what was sold to Ishri Prasad by the heir of Bal Kishan was the full right of ownership and not the mere right, title and interest of the transferor. An examination of Ishri Prasad's sale deed makes this clear. That sale-deed was registered. Ishri Prasad's vendor was the full owner if the mortgage of the 21st of August, 1894, was out of the way, but we may assume for the purposes of this appeal that the vendor legally owned only the property subject to that mortgage, what he purported to sell, was the full right of ownership. In this way he may or may not have acted dishonestly, but there is nothing to show that Ishri Prasad had any notice whatever of the pre-existing unregistered mortgage. The prior mortgagee brought the present suit for sale out of which this appeal has arisen.

In defence, Ishri Prasad pleaded section 50 of the Registration Act and urged that his registered sale-deed took effect as regards

(1) (1882) I. L. R., 6 Bom. 193.

the property comprised therein against the unregistered mortgage deed of the plaintiff which related to the same property The court of first instance upheld this plea and dismissed the suit The lower appellate court reversed that decision and decreed the suit On second appeal to this Court, the learned Judge who heard the appeal confirmed the decree of the court below hence this appeal under the Letters Patent

It is urged before us and with great force, that our learned brother has taken a wrong view of the facts of the case The argument in his judgement is that what was mortgaged to Bindra ban was the equity of redemption and this is what Bindraban pur chased and what his son sold to Bal Kishan and what Bal Kishan's heir transferred to Ishri Prasad, and as the latter only purchased equity of redemption the two deeds do not cover the same property and therefore section 50 of the Act does not apply Reliance was placed on the decision in *Sobhagchand Gulabchand* v *Bhai chand* (1) The error in the above is patent on an examination of sale deed in favour of Ishri Prasad That deed does not purport to transfer only the right title and interest of the transferor, but is in plain terms a sale out and out of the full right of ownership in the property The mortgage in the present suit is a mortgage of the same property

The two deeds, therefore *do* cover the same property and sec tion 50 of the Act does apply

There can be no question that if the original mortgagors had executed the two deeds now in conflict, the sale deed being regis tered would take effect against the unregistered mortgage deed, even though *after the execution of the latter*, the mortgagors would have been the owners of only the equity of redemption.

The rights of the mortgagors were acquired by the appellant's vendor, but he sold to the appellant not the equity of redemption but the property itself In principle there is no difference

We would call attention to the remarks of MELVILLE J in I L R 6 Bom., 193 to be found at page 208 and which were quoted with approval by AIKMAN, J, in *Baldeo Prasad* v *Baldeo* (2)

In the present case the "estate" was covered by both the deeds in suit The case is also covered by the un reported decision in

(1) (1882) I L R., 6 Bom., 193. (2) Weekly Notes, 1901 p 112.

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ISHRI PRASAD v. GOPI NATH

his deed of transfer amplify the *quantum* of defendant, therefore, could not possibly be dee any larger interest than Bindraban originally was admittedly inferior to the plaintiff's title, a of a subordinate intere t subject to the plai It is an elementary principle of law that no or title than he himself has, and the analogy sugg cannot be pushed so far as to include a case lik tion 50 will only apply where the two deed each other, in other words, where it is impossi one without destroying the other I rely on *S chand* v *Bhaichand* (1)

Babu *Sital Prasad Ghosh* not heard in rep

RICHARDS, C J, and TUDBALL, J —The fac follows —

Ram Bakhsh and others mortgaged certa present respondents on the 21st of August, 189 May 1896, they mortgaged the same property mortgage deeds were unregistered Bindrabar sale on his mortgage and purchased the prope tion of his decree His son sold the property t latter s heir sold it to Ishri Prasad the present be clearly noted here, that though Bindraba auction sale the right, title and interest of his was sold to Ishri Prasad by the heir of Bal E right of ownership and not the mere right, titl transferor An examination of Ishri Prasad s clear That sale-deed was registered Ish was the full owner if the mortgage of the 21st o out of the way but we may assume for the pur that the vendor legally owned only the propo mortgage, what he purported to sell, was the ship In this way he may or may not have acte there is nothing to show that Ishri Prasad had n of the pre existing unregistered mortgage T brought the present suit for sale out of which t

In defence Ishri Prasad pleaded section 50 Act and urged that his registered sale-deed t

(1) (1892) I L R. 6 Bom. 193

contended that the application was statute barred The first court repelled the contention and allowed execution Upon appeal the Judge held that it was a decree for the payment of money within the meaning of section 230 of the Civil Procedure Code and rejected the application as time barred

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MAHARAJA OF BENARES v. LALJI SINGH

The decree holder appealed to the High Court, and the case came before KARAMAT HUSAIN and CHAMIER, J J, who delivered the following judgements —

KARAMAT HUSAIN J —The appellant obtained a decree from the court of the Subordinate Judge of Arrah, against four persons The operative part of the decree may be rendered as follows — "It is decreed and ordered that the plaintiff's claim against defendant No 3 be decreed *ex parte*, and against defendant No 2 on his admission of the claim and against defendants Nos 1 and 4 according to a compromise The decree goes on further to direct, that if the decretal money be not recovered from the defendants Nos 1, 2 and 3, then it should be recovered from the property mortgaged by the 4th defendant as a surety The decree was transferred to Benares It was passed on the 26th of May, 1897, and the application for execution of it was made on the 5th of January, 1910

Lalji, one of the respondents in this Court, objected that the decree was barred under the provisions of section 230 of the Code of Civil Procedure of 1882 This contention was accepted by the learned Judge who in his judgement said —

The decree with which I am concerned is however a money decree so far as it affects the appellant and other lessees and a mortgage decree so far as it affects the surety of Lachman Singh

Coming to that conclusion the lower appellate court dismissed the application for execution In second appeal it is urged by the learned vakil for the decree holder that the decree of which execution is sought is a mortgage decree within the meaning of section 230 of the Code of Civil Procedure Act No XIV of 1882 I am unable to accept this contention The decree, so far as the respondent, Lalji Singh, is concerned, cannot be regarded as a mortgage decree in any sense of the word. So far as the appellant is concerned it is a decree for payment of money I therefore, would dismiss the appeal with costs

CHAMIER J —The suit in which the decree now in question was obtained was brought against three lessees who were defendants

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MAHARAJA OF BENARES v. LAIJI SINGH

1, 2 and 3, and their surety, who was defendant No 4 The decree directed the defendants 1, 2 and 3 to pay the amount decreed in certain instalments and then went on to provide that if the money decreed could not be recovered from defendants 1, 2, and 3, the decree holder might proceed to bring to sale the property which had been mortgaged to the plaintiff by the surety The decree-holder made several ineffectual attempts to recover his money in the district in which the decree was passed Subsequently the decree was transferred for execution to Benares By the present application the decree holder seeks to bring to sale some immovable property belonging to defendants 1, 2 and 3, or one or more of them His application has been dismissed on the ground that the decree so far as defendants 1, 2 and 3 were concerned was a decree for the payment of money within the meaning of section 230 of the Code of Civil Procedure 1882 The lower appellate court has accepted the contention and dismissed the application with costs

This is a second appeal by the decree holder It is conceded in accordance with a recent decision of this Court, that section 48 of the Code of Civil Procedure 1908, does not apply to the case, and that the question for decision is whether the decree held by the appellant is a decree for the payment of money within the meaning of section 230 of the Code of 1882 The decree in my opinion, cannot by any possibility be described as a decree for money against defendant 4 If it is possible to split up the decree into two decrees, then no doubt it may be said that the decree is a decree for payment of money against defendants 1, 2 and 3, and is a decree for the sale of immovable property against defendant No 4 to which the third paragraph of section 230 of the Code of 1882 does not apply But it seems to me that if a decree can be split up in this way where different reliefs are given against different sets of defendants then a decree may be split up also where several distinct reliefs are given against the same set of defendants I find no justification for this course in section 230 The terms of the decree before us undoubtedly go beyond the terms of an ordinary decree for the payment of money as this expression has been interpreted by this Court. It provides for the sale of immovable property under certain contingencies In my opinion the principle on which the case of *Bikahran Singh*

Narain Das (1) was decided applies to the present case and I would hold that the decree before us is not a decree for the payment of money within the meaning of section 230, and I would allow this appeal set aside the decree of the court below, and remand the case for disposal on the merits according to law

The decree of the Court accordingly followed the judgement of KARAMAT HUSAIN J against which the decree holder preferred this appeal under section 10 of the Letters Patent

Babu *Beni Madho Ghosh* and Babu *Surat Chandra Chaudhri*, for the appellant

Munshi *Gulzari Lal*, for the respondents

RICHARDS C J and BANERJI J—The facts connected with this appeal are as follows —A suit was brought against certain lessees and their surety The suit resulted in a compromise decree which provided that in the first instance the lessees should pay the amount of the decree by instalments and that the decree should be capable of execution against them If the decree holder failed to realize the amount of his debt in this way from the lessees, then he was to be entitled to bring the property which the surety had mortgaged to sale The decree was granted in May, 1897 The present application for execution was made on the 5th of June, 1910, that is to say more than twelve years after the granting of the decree The application was made against the lessees only It was an application to execute the decree not as a mortgage decree but as a simple money decree Section 230 of Act XIV of 1882 provides that where an application to execute a decree for the payment of money or the delivery of other property has been made under this section and granted no subsequent application to execute the same shall be granted after the expiration of twelve years from *inter alia* the date of the decree or the date upon which payment of money was ordered by the decree It has been conceded here that if the decree can be treated as a simple money decree, then it was barred by limitation by virtue of the provisions of section 230 more than twelve years having elapsed from the date of default in payment of the instalments It is argued however that because the decree directs that if the decree-holder has failed to realize the amount of his decree against the first three judgement-debtors, he can bring the property of the fourth

(1) (1910) I L R 32 All 401

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AHARAJA BENARES v. LJI SINGH

judgement debtor to sale, therefore this decree is not a decree for payment of money but must be regarded as a mortgage decree It has no doubt been held by this Court that section 230 does not apply to a mortgage decree, but in our opinion, the compromise decree in the present case was a simple money decree as against the first three defendants and only became a mortgage decree against the fourth defendant after default was made It was a conditional decree for the sale of his property We have already pointed out that it was being executed as a simple money decree and that it could never have been executed against the first three defendants as anything else except a simple money decree It comes within the very words of section 230, clause (iii) The case of *Pahalwan Singh* v *Narain Das* (1) has been referred to In that case the compromise decree was against a single defendant It only differed from an ordinary mortgage decree under section 88 of the Transfer of Property Act by substituting certain instalments for the usual six months allowed for payment of the mortgage money The application to execute such decree was an application to execute a mortgage decree by sale of the mortgaged property Therefore it is quite clear that that case has no application to the present case In our opinion the decree appealed against was correct and this appeal should be dismissed. We accordingly dismiss the appeal with costs

Appeal dismissed

1912
June 24

Before Mr Justice Sir George Knox and Mr Justice Karamat Husain

NANDAN SINGH (PLAINTIFF) v JUMMAN AND OTHERS (DEFENDANTS).

Mortgage—Estoppel—Power of representatives of mortgagor to question validity of mortgage—Adverse possession—Possession adverse to mortgagor not necessarily adverse to mortgagee

Held that although the representatives of a mortgagor cannot as such question the validity of the mortgage it may be open to them as *mutawallis* to plead that the property was waqf and that the mortgage of it was void *Ghazaffar Ali* v *Fida Ali* (2) distinguished.

Held also, that a simple mortgage being not merely a security for a debt but a transfer of an interest in the property mortgaged a trespasser who ousts the mortgagor and holds the property adversely to him may by prescription become

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Second Appeal No 985 of 1911 from a decree of G A. Paterson, District Judge of Benares dated the 8th of August 1911 confirming a decree of Rash Chandra Ban Subordinate Judge of Benares dated the 21st of June, 1911

(1) (1900) I L R., 22 All 401 (2) (1883) I L R 6 All., 24

the owner of the limited estate which the mortgagor had in the property but such advers posse sion cannot extinguish the right of the mortgagee *Agency Company* v *Short* (1) *Smith* v *Lloyd* (2) *Se retary of State for India* v *Krish namoni Gupta* (3) and *Ismdar Khan* v *Ahmad Husain* (4) referred to *Rama swami Chetty* v *Ponna Padayachi* (5) and *Pratap Bahadur Singh* v *Maheshwar Bakhsh Singh* (6) not approved. *Aimadar Mandal* v *Makhan Lal Day* (7) and *Parthasarathi Naikan* v *Lakshmana Naikan* (8) approved and followed *Karan Singh* v *Bakar Ali Khan* (9) discussed

THE facts of this case were as follows —

Kudrat Shah and others the predecessors in title of defendants, 2 and 3, made a simple mortgage of two plots of land with houses and trees, one of which was near Taksal and the other near Kabir Chaura in favour of the plaintiff on the 5th of July, 1875 They again mortgaged the same property to the same mortgagee on the 12th of March 1878 One Subhan alleging himself to be the son in law of Kudrat Shah on the 15th of September, 1893, sold the land near Taksal to Mu ammat Biraiya who made a mortgage of it to Babu Sital Prasad and Bisheshar Prasad on the 22nd of Decem ber, 1893 They obtained a decree on their mortgage on the 7th of November 1900, in execution of which the land was purchased by Ram Dei who built on it a house with a cost of about Rs 6,000 The plaintiff sued on his two mortgages on the 4th of May 1910, claiming Rs 1 628 6 3 The defendants 1 2 and 3, as *mutawallis* pleaded that the property near Kabir Chaura was waqf and that the mortgage of it was void Ram Dei pleaded that the suit relating to the land near Taksal was barred by limitation

The first court dismissed the suit Regarding the property near Kabir Chaura the dismissal was based on the unlawfulness of the mortgage of waqf property Regarding the property near Taksal it was based on limitation The lower appellate court affirmed the decree of the first court

The plaintiff appealed to the High Court

Mr *B E O'Conor* and Munshi *Gokul Prasad*, for the appel lant

Dr *Satish Chandra Banerji* and Dr *Tej Bahadur Sapru*, for the respondents

(1) (1888) L. R. 13 A C 793
(2) (1854) 9 Ex 562.
(3) (1907) I L R 29 Calc. 518
(4) (1907) I L. R. 30 All. 119
(5) (1911) 21 M L J 807
(6) (1909) 12 O C 45
(7) (1906) I. L. R. 33 Calc., 1015
(8) (1911) 21 M. L. J., 477
(9) (1882) I L. R. 5 All. 1.

1912

NANDAN SINGH v. JUMMAN

KARAMAT HUSAIN, J.—The facts of the case are these:—Kudrat Shah and others, the predecessors in title of defendants, 2 and 3 made a simple mortgage of two plots of land with houses and trees, one of which is near Taksal and other near Kabir Chaura in favour of the plaintiff, on the 5th of July 1875. They again mortgaged the same property to the same mortgagee on the 12th of March, 1878. One Subhan, alleging himself to be the son in law of Kudrat Shah on the 15th of September, 1893, sold the land near Taksal to Musammat Biraija, who made a mortgage of it to Babu Sital Prasad and Bisheshar Prasad on the 22nd of December 1893. They obtained a decree on their mortgagee on the 7th of November, 1900 in execution of which the land was purchased by Ram Dei who built on it a house with a cost of about Rs. 6,000.

The plaintiff sued on his two mortgages on the 4th of May, 1910 claiming Rs. 1,628-6-3. Defendants 1, 2 and 3, as mutawallis, pleaded that the property near Kabir Chaura was waqf and that the mortgage of it was void. Ram Dei pleaded that the suit relating to the land near Taksal was barred by limitation.

The first court dismissed the suit. Regarding the property near Kabir Chaura the dismissal was based on the unlawfulness of the mortgage of waqf property. Regarding the property near Taksal it was based on limitation. The lower appellate court affirmed the decree of the first court.

In second appeal two points are taken:—

(1) The representatives of the mortgagors cannot question the validity of the mortgage, and (2) the adverse possession of a trespasser against a mortgagor is not in every case adverse to his simple mortgagee. On the first point I am of opinion that it is open to the representatives of the mortgagors as mutawallis to plead that the property was waqf and that the mortgage of it was void. They could be estopped from raising such a plea as representatives of the mortgagors but as mutawallis they cannot be regarded as the representatives of the mortgagors. When the law renders the mortgage of waqf property void the mortgagee of such property is presumed to know the law and if he takes a mortgage of such property he does so at his own risk. *Gulzar Ali v. Fida Ali* (1) has no application. There a trustee

(1) (1883) I. L. R., 6 All., 24.

representing the property as his own mortgaged it, and when the mortgagee had got a decree, the trustee sued to recover the property In these circumstances the trustee was held to be estopped. 1912

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Karamat Husain J

There is a conflict of authority on the second point and before going into the case law on the subject I deem it fit to set forth the conclusion to which the legal principles lead Adverse possession in the nature of things is impossible against a person who has no right to possession and hence the legal maxim "*Contra non volentem nulla currit prescriptio*" (Prescription does not run against a person who is unable to act) On the same foundation rests the exposition of law by PARKE, B, quoted by the Lords of the Privy Council in the *Trustees, Executors and Agency Company* v *Short* (1) as follows —"In the latter case, *Smith* v *Lloyd* (2) which was decided in 1854, PARKE, B, in giving the judgement of the Court says — We are clearly of opinion that the Statute applies not to cases of want of actual possession by the plaintiff but to cases where he has been out of and another in possession for the prescribed time There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the Statute'"

Their Lordships reaffirm the opinion of PARKE, B, in *Secretary of State for India* v *Krishnamoni Gupta* (3) They remark —

'In the case of *The Trustees, Executors and Agency Company* v *Short* (4) it was laid down by this Board that 'if a person enters upon the land of another and holds possession for a time and then without having acquired a title under the statute abandons possession the rightful owner on the abandonment is in the same position in all respects as he was before the intrusion took place' and the opinion of PARKE, B, is there quoted that there must be both absence of possession by the person who has the right and actual possession by another to bring the case within the Statute'

On the same principle proceeds *Ismdar Khan* v *Ahmad Husain* (5) The portion of the judgement bearing on the point is as folllows —

"As the defendants wrongfully dispossessed the mortgagees and themselves took possession their possession was undoubtedly

(1) (1888) L R 13 A C 793
(2) (1902) I. L. R. 29 Calc 518 535.
(3) (1854) 9 Exch. 562
(4) (1888) L. R. 13 A. C. 793
(5) (1907) I. L. R. 30 All., 119

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adverse to the mortgagees, and as their adverse possession has continued for a longer period than twelve years the right of the mortgagees has, under section 28 of the Limitation Act become extinct and has vested in the defendants The possession of the mortgagees was not full proprietary possession, but was possession of a limited nature It is this possession of which they were deprived by the defendants, so that the adverse possession of the defendants was also of the limited character and had the effect of extinguishing the limited interests of the mortgagees and vesting those interests in the defendants The possession of the defendants was not therefore adverse to the plaintiff There may be cases in which adverse possession against the mortgagee would also be adverse against the mortgagor, for example, where the mortgagor is entitled to immediate possession or where the possession of the trespasser is coupled with a denial of the title of the mortgagor But, as held in *Muhammad Husain* v *Mul Chand* (1) following *Chinto* v *Janki* (2) possession obtained by the ouster of a mortgagee in possession is not necessarily adverse to the mortgagor also In the present case it has been found that the title of the plaintiff was never denied by the defendants *It* is also an admitted fact that when the defendants took possession the persons entitled to remain in possession were the mortgagees and not the morgagors and that the mortgage was unsatisfied As the plaintiff had therefore no right to immediate possession the defendants cannot be held to have been in possession adversely to plaintiff As observed by Mr Justice MARKBY in *Bejoy Chunder Banerjee* v *Kally Prosonno Mukerjee* (3) by adverse possession is meant possession by a person holding the land on his own behalf or on behalf of some person other than the true owner the true owner having a right to immediate possession We are therefore, unable to accept the defendants' contention that their possession is adverse to the plaintiff and that the claim is time barred'

A mortgage under the Transfer of the Property Act (Act No IV of 1882) is the transfer of an interest in specific immovable property for the purpose of securing the payment of money In a simple mortgage therefore an *interest in the property* mortgaged is carved out of the aggregate interests symbolized by the

(1) (1904) I. L. R. 27 All. 395 (2) (1892) I. L. R. 18 Bom. 51.

(3) (1878) I L R. 4 Calc 327,

legal term "ownership" and vested in the mortgagee and the residue of those interests remains in the mortgagor. This residue may be called "the equity of redemption with possession." A mortgagee under a simple mortgage by virtue of the interest in the property mortgaged which he acquires has the right to bring it to sale for the realization of the mortgage debt (Section 67, Transfer of Property Act). Such a mortgage gives him no right to take possession of the property mortgaged. The legal position of the parties to a simple mortgage is as follows. The mortgagor owns the equity of redemption with possession and is in possession of the property as a limited owner. The mortgagee owns an interest in the property which entitles him to have the property sold by court for the satisfaction of the mortgage debt but has no right to enter into possession of the property. In these circumstances if a trespasser ousts the mortgagor *after the execution of the simple mortgage,* he can take possession of what belongs to the mortgagor and can hold adversely to him to the extent of his limited interest. In other words, he can hold the property adversely subject to the liability of its being sold for the satisfaction of the mortgage debt. His adverse possession cannot in any way affect the right of the mortgagee to bring the property to sale. Adverse possession of the limited ownership in the property which is all that remains in the mortgagor is not recognised by law as one of the causes which extinguish the mortgagee's right to bring the property to sale. Adverse possession affects rightful possession and such rights as go with it and cannot destroy such rights as are independent of it. A necessary corollary of the above mentioned principles is that a trespasser who ousts a mortgagor under a simple mortgage and holds the property adversely to him may by prescription become the owner of the limited estate which the mortgagor had in the property, but such adverse possession cannot extinguish the right of the mortgagee. This of course happens when adverse possession begins after the simple mortgage. If adverse possession precedes the simple mortgage it will run against the mortgagor and the mortgagee both. Similarly if the mortgagee is entitled to the possession of the property mortgaged, adverse possession will run against him from the date of his right to

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possession In two reported cases it has, however, been held that adverse possession against the mortgagor extinguishes the security of the mortgagee

ABDUL RAHIM, J, in *Ramaswami Chetty* v *Ponna Padayachi* (1) took that view The reasons which led him to it are that the mortgage is only a security for the debt, that the interest in the land remains with the mortgagor, that a decree for sale in favour of the mortgagee cannot bind the trespasser, and that *Karan Singh* v *Barkat Ali Khan* (2) covers the point With due respect to the learned Judge, a simple mortgage is not *merely a security for the debt*, it is the *transfer of an interest in the property mortgaged*, which interest cannot be affected by the adverse possession of a trespasser over the *limited interest of the mortgagor* No one can doubt the correctness of the proposition that a decree for sale against a mortgagor cannot bind a trespasser who is no party to the decree, but it must not be forgotten that the property which the trespasser acquires is the property which is liable to sale at the instance of the mortgagee, and the adverse possession of the limited estate of the mortgagor is not sufficient to free it from that liability If a simple mortgage did not create *an interest in the property* in favour of the mortgagee, adverse possession against the mortgagor who would have been the full owner of the property would have extinguished the security In the case before us the law gave the mortgagee sixty years to enforce his remedy and the ouster of the mortgagor by the trespasser in the absence of statutory provisions to that effect cannot cut it down to twelve years and force the mortgagee to sue the trespasser in ejectment who may well plead that no suit for ejectment lies and that there is no cause of action for sale against him. *Karan Singh* v *Barkat Ali Khan* has no application to the case of adverse possession, which begins *after the execution of a* simple mortgage against the mortgagor In that case the village Khard Khera was in dispute between Karan Singh on one hand and Kharag Singh and Rudar Singh on the other The Collector took possession of it as *kurk tahsil* in April 1861 The guardian of Kharag Singh and Rudar Singh mortgaged it on the 7th of January and the 6th of October 1862 Karan Singh obtained a decree

(1) (1911) 21 M L J 97 (2) (1882) I L R 5 All 1

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for the village, and the Collector delivered possession of it to Karan Singh in October, 1863, making over to him the surplus profits too In 1874, the mortgagee sued on the mortgages of 1862 Karan Singh pleaded limitation, attempting to tack on the Collector's possession which began in April, 1861, to his own Their Lordships ruled that the Collector's possession was not adverse to the owner and could not be tacked on to that of Karan Singh From this ruling it is sought to be inferred that their Lordships were of opinion that the adverse possession against a mortgagor which begins *after a simple mortgage* is adverse to the mortgagee They have not expressly so ruled, and to rely on an inference is very dangerous Moreover, the possession of the Collector in that case began *before the mortgage* and it had been adverse to the mortgagee also inasmuch as the mortgagor at the commencement of adverse possession was not the mortgagor but the absolute owner of the property In that case the Collector's possession *began before the mortgage*, and the rule that his possession if adverse to the mortgagor was also adverse to the mortgagee, would have been sound law but could not have governed cases in which adverse possession *began after a simple mortgage* The distinction has been noticed by MUNRO, J, in *Parthasarathi Naikan* v *Lakshmana Naikan* (1) He says —'Had the Collector's possession which began before the mortgage been adverse to the mortgagors and had the defendant claimed through the Collector, then the mortgagee's suit would have been barred as in *Nallamuttu Pillai* v *Betha Naikan* (2) This supplies a reason why it was considered necessary to consider the question of tacking'

ABDUL RAHIM, J is also of opinion that the result of holding that adverse possession against a mortgagor does not extinguish the security of his mortgagee "would be that when a property is under mortgage and the mortgagor or his successor in interest goes on paying interest on the debt or otherwise acknowledges his liability, persons in peaceable and unchanged possession and enjoyment of such property in assertion of their own rights whatever the length of the time during which their possession and enjoyment might have lasted would not be secured in the title. This in his opinion is monstrous. With due respect I am unable to agree with him. I see no reason why the invader of the possession and

(1) (1911) 21 M L J., 467 (2) (1900) I L R 23 Mad., 37

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Government Notification No 2640, published in the Government Gazette Part III, page 337, of the 30th of July, 1910 In paragraph 6 of the petition the plaintiff said —"The plaintiff has come to know from inquiry that *(a)* fraudulent proceedings were taken and threats were held out, and the defendant, his agents or friends made an unauthorized person vote in place of the rightful voter, *(b)* that, at the defendant's election, certain improper proceedings were taken on his behalf The names of some of the voters are given at the foot of the plaint Other names will be given later on after the inspection of the ballot paper" Below this, four instances or particulars of illegal votes were given This petition was filed within fifteen days of the election as provided by the Government Notification, but after that period was over, the petitioner applied to add six more instances of illegal voting The Munsif granted this application and after recording evidence set aside the election of the defendant The opposite party appealed to the District Judge who held that the Munsif was not justified in allowing the plaint to be amended, and therefore he disregarded the instances of illegal votes subsequently added and decreed the appeal, dismissing the plaintiff s petition.

Mr *B E O Conor*, for the appellant, submitted that the lower appellate court had mixed up the grounds on which an election petition can be filed with the instances of illegal votes The petitioner was not entitled to add new grounds after the prescribed period, but he could add new instances The cause of action was the malpractice and not the particular instance set up Instances can be given after filing the petition and before trial Rogers on Elections Vol III pp 219 220 In this case particulars were given before the first hearing

The Hon ble Dr *Sundar Lal* for the respondent submitted that the procedure in such cases in India was quite different from what it was in England In England there was special law on the subject The Local Government was entitled to make rules under section 187 of the Municipalities Act Those rules had the force of law The law did not lay down any mode of trial The Local Government could frame rules which it had not done The only rule on the subject was rule 42 and it laid down that no election could be set aside except on an application within a certain number

of days The rules did not define what was corrupt practice The present petition made a mention of corruption undue influence and personation in a vague manner If particulars could be supplied later on those words could be safely used in every case Here all possible charges were made Four cases of personation were alleged and six more were proved in evidence There was no evidence given of anything but personation The amendment could only be made within the period in which the original plaint could have been filed According to English practice a petition was to be filed within a certain number of days of the election and within a certain time after that instances were to be alleged Further charges too were to be made within a certain time Here all charges and particulars were alleged in the petition Otherwise the result would be that we could go on adding fresh particulars every day and in certain cases it may go on for several months The petitioner ought to make all allegations within 15 days Inspection could have been made within this time

RICHARDS C J and TUDBALL J —This appeal arises out of an election petition Nawab Khan was one of the electors at an election of the Municipal Board of Allahabad which was held on the 8th of March, 1911 At that election the respondent Muhammad Zamin was declared duly elected Within fifteen days the present petition questioning the validity of the election was presented in the court of the Additional Munsif The grounds for questioning the election are set forth in paragraph 6 of the petition In clause *(a)* it is asserted that fraudulent proceedings were taken and threats were held out and the defendant his agents or friends made unauthorized persons vote in place of rightful voters Four instances of impersonation were then set forth and it went on to assert that other names would be given later on after the inspection of the ballot papers Before the petition was heard the petitioner was in a position to give further cases of personation and the petition was amended by adding the particulars of six additional cases of alleged personation. The learned Additional Munsif heard the case and found that a certain number of cases of personation were proved, and he accordingly set aside the election.

The respondent appealed to the District Judge. In that court and in this Court it was admitted that personation, to which the

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candidate or his agents were parties, was a good ground for setting aside an election The learned District Judge held that the Munsif had jurisdiction to hear the petition and in this Court it has not been contended—and, in our opinion could not be contended—that the Munsif had not jurisdiction to hear the case The learned District Judge however, set aside the decree of the Munsif and dismissed the petition upon the ground that the court had no power to amend the petition by adding the further cases after the expiration of fifteen days from the date of the election The learned District Judge held that those cases which were originally set forth in the petition were not proved and that therefore the petitioner s case failed

The only question which we have to decide in the present appeal is whether or not the petitioner was entitled to give evidence of the additional cases which were mentioned for the first time after the expiration of 15 days of the election. Rules have been framed under the Muncipalities Act, section 187, with regard to election petitions Rule 42 is as follows —

The validity of an election made in accordance with these rules shall not be questioned except by a petition presented to a competent court within 15 days after the day on whi h the election was held by a person or persons enrolled in the Municipal electoral roll

Provided that no election shall be called in question on the ground that

(a) the name of any person qualified to vo e has been omitted from or the name of any person not qualified to vote has been inserted in the electoral roll or rolls made and revi ed under rules 1 and 2 of these rules or

(b) the name of any person qual fied for election as a member of the Board has been omitted from or the name of any person not qualified for election as a member of the Board has been inserted in the candidate list as prescribed under rule 9 of these rules

This is the only rule relating to election petitions The learned District Judge says —

Reading rule 42 it seems to me perfectly plain that the intention of the Legislature is that specific and not general grounds for questioning an election shall be alleged and that those grounds shall all be put forward within 15 davs of the election The two provisos and the words shall not be questioned except by pe ition presented within 15 days seem to place this beyond doubt. It would stultify the section if a petitioner were allowed to allege general corruption and then add specific instances to his plaint at leisure as he gathered material

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In the present case the petitioner alleged that the respondent had been guilty of misconduct in the course of the election by procuring persons to personate dead or absent voters That was the ground of the petition. The particular instances of personation are quite another matter, and in our judgement it was quite open to the petitioner to furnish those particulars after the expiration of the 15 days What the court had to guard against was the respondent being taken by surprise by the petitioner keeping back the particulars until the last moment It seems to us perfectly clear that there is nothing in the rule which requires that all the particulars should be specified in the petition In many cases and probably in the present case, it would have been impossible for the petitioner to have furnished all these particulars within 15 days The practice in England with regard to elections is to allow particulars of the charges to be given after the petition is presented, and we see no reason whatever why the same practice should not prevail here in the absence of clear rules on the point The court will always have it in its power to prevent any abuse of the process of the court by insisting that proper particulars shall be furnished to the respondent in ample time to enable him to meet the charges The mere fact that the additional particulars were given by means of amending the plaint is in our opinion no reason why we should hold that the petitioner was not entitled to go into evidence and prove the additional cases

We allow the appeal set aside the decree of the learned District Judge and remand the case to his court with directions to re admit the appeal under its original number on the file and to proceed to hear and determine the same according to law, having regard to what we have stated above The appellant will have his costs in this Court Other costs will be costs in the cause

Appeal decreed—Cause remanded

REVISIONAL CRIMINAL

1912
July 18

Before Mr Justice Sir George Knox
EMPEROR v LALTA PRASAD *

Criminal Procedure Code section 195 (c)—Sanction to prosecute—Forgery—Offence alleged not in connection with any proceeding before any Court—Sanction unnecessary

By section 195 clause (c) of the Code of Criminal Procedure courts are prohibited from taking cognizance of an offence described in section 463 of the Indian Penal Code when such offence has been committed by a party to any proceeding in any court in respect to a document produced or given in evidence in any such proceeding The section does not remove from the cognizance of criminal courts an offence described in section 463 when such an offence has been committed by an ordinary individual So long as the prosecution is confined to offences connected with a document committed prior to its production in court such prosecution is within the law and requires no sanction

The facts were as follows —

Lalta Prasad applied for compulsory registration of a sale deed in his favour The deed was registered on the 8th of September 1911 It was afterwards discovered that certain entries in the deed had been tampered with prior to the registration The Registrar brought the matter to the notice of the District Magistrate, who passed the order —' There is a strong *prima facie* case of forgery I direct prosecution of Lalta Prasad ' Proceedings were commenced Before this a civil suit was brought by the executant of this deed against Lalta Prasad for declaration that the deed as registered was forged. An application was then made to the criminal court for staying its proceedings pending the decision of the civil court It was refused and some evidence for the prosecution was taken. Lalta Prasad then applied in the High Court for revision of the order of the District Magistrate directing the prosecution.

Munshi Gulzari Lal (Mr *C Ross Alston* with him), for the applicant —

The prosecution is bad in law It contravenes the provisions of section 195 (c) of the Criminal Procedure Code A proceeding in respect of the document alleged to have been forged is pending in the civil court and Lalta Prasad is a party to that proceeding Hence, no criminal court can take cognizance of the

* Criminal Revision No 874 of 1912 from an order of I U Allen District Magistrate of Bareilly dated the 10th of February 1912

offence of forgery alleged to have been committed by Lalta Prasad in respect of that document except with the sanction or on the complaint of that civil court or some other court to which it is subordinate The District Magistrate had no jurisdiction to sanction or direct the prosecution To hold otherwise would be to very much limit the operation of section 195 (c) No such limitation appears in the section itself Then, no charge has yet been framed, and it is not known whether the charge against the applicant will be one of forgery or of uttering a forged document The latter charge can at all events, not be taken cognizance of without the sanction of the court in which the forged document is produced

The Assistant Government Advocate (Mr *R Malcomson*) for the Crown, was not called upon.

KNOX J —A forgery is alleged to have been committed with reference to deed of sale From the deed it would appear that if a forgery was committed it was committed on or about the 8th of September 1911 At that time no proceedings were pending with reference to this particular document The District Magistrate of Bareilly has by an order dated the 16th of February, 1912, directed the prosecution of Lalta Prasad for forgery and made the case over to one Mr Karar Husain for hearing An objection is raised to this order based upon section 195, clause (c), of the Code of Criminal Procedure

It is true that the Magistrate has not stated under what section he has directed the prosecution but a prosecution for forgery would ordinarily run under section 463 of the Indian Penal Code As I read section 195, clause (c) courts are prohibited from taking cognizance of an offence described in section 463 when such offence has been committed by a party to any proceeding in any court in respect to a document produced or given in evidence in any such proceeding The section does not remove from the cognizance of Criminal Courts an offence described in section 463 when such an offence has been committed by an ordinary individual Suppose, for instance this very document had never been put into the civil court and suppose further that it is a forgery—is the person who forged it to be free from all prosecution? I do not by this mean to say that I have any reason for saying this document is a forged document, I know nothing about

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it As long as the prosecution is confined to offences connected with this document committed prior to its production in court, such prosecution is within the law and requires no sanction Sanction is required for offences committed by a party to a proceeding in any court, in respect to a document produced or given in evidence in such proceeding

I find no reason for interfering and dismiss the application.

Application dismissed

APPELLATE CIVIL

1912 *July* 25

Before Sir Henry Richards Knight Chief Justice and Mr Justice Banerji

NARAIN DAS AND ANOTHER (PLAINTIFFS) v THE EAST INDIAN RAILWAY COMPANY (DEFENDANT) *

Act No IX of 1890 (Indian Railways Act) section 75—Goods referred to in section 75 consigned on a risk note —Railway Company not liable for loss

Where a person chooses to send goods referred to in section 75 of the Indian Railways Act on a risk note form instead of declaring them and paying the extra percentage demandable under the terms of the section he cannot hold the Railway Company by which such goods are sent responsible for the loss thereof

In this case the plaintiffs or their agents consigned certain bars of silver for delivery at Allahabad to the Great Indian Peninsula Railway Company at Bombay The box was delivered intact at Jubbulpore to the East Indian Railway Company but when it was delivered at Allahabad one of the bars, valued at over Rs 2 000 was missing The box was sent on a risk note form and the plaintiffs did not pay the extra percentage provided for by section 75 of the Indian Railways Act 1890 The plaintiffs sued the East Indian Railway Company for compensation and obtained a decree from the Subordinate Judge of Allahabad. On appeal, however this decree was reversed by the District Judge and the plaintiffs suit dismissed The plaintiffs appealed to the High Court

Dr *Satish Chandra Banerji* and Munshi *Damodar Das*, for the appellants

Mr *B E O Conor* and Pandit *Ladli Prasad Zutshi*, for the respondents

* Second Appeal No 256 of 1912 from a decree of H E Holme District Judge of Allahabad dated the 6th of December 1911 reversing a decree of Guru Prasad Dube Subordinate Judge of Allahabad dated the 19th of June 1911

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NARAIN DAS v. THE EAST INDIAN RAILWAY COMPANY

RICHARDS, C J and BANERJI, J —The facts connected with this appeal are shortly as follows —Plaintiffs or their agents consigned certain bars of silver for delivery at Allahabad to the Great Indian Peninsula Railway Company at Bombay The Great Indian Peninsula Railway Company delivered the box intact to the East Indian Railway at Jubbulpore When the box was delivered to the plaintiffs or their agents at Allahabad it was found that one silver bar was missing, valued by the plaintiffs at Rs 2,044 12 0 There can be no doubt that the silver bar was stolen in the course of its transit between Jubbulpore and Allahabad either by one or more of the company's servants or by an outsider As to how it was stolen there appears to be no evidence Section 75 of the Railways Act of 1890 provides that "when any articles mentioned in the second schedule are contained in any parcel or package delivered to a railway administration for carriage by railway and the value of such articles in the parcel or package exceeds one hundred rupees the railway administration shall not be responsible for the loss, destruction or deterioration of the parcel or package unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared * * * and if so required by the administration paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk" In the present case the plaintiffs or their agents signed a risk note which shows clearly on the face of it that they had been required to pay an increased percentage on the value but had elected not to do so This being so the only question which arises in the appeal is whether or not the silver can be said to have been 'lost' within the meaning of the section It is contended that it would not be lost unless the actual way in which the silver was stolen was proved by the Railway Company In our opinion this argument has no force whatever As already stated it is absolutely clear from the admitted facts that the silver bar was stolen whilst in transit between Jubbulpore and Allahabad. The package was delivered intact at Jubbulpore and one bar was missing when it was delivered to the plaintiffs or their agents at Allahabad. In our opinion this was a loss within the meaning of section 75 The case of *Hearn v The London and South Western Railway Company* (1) is cited on behalf of the appellants This case

(1) (1855) 10 Ex., 793

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NARAIN DAS v THE EAST INDIAN RAILWAY COMPANY

turned upon an argument as to the sufficiency of a plea In that case the declaration alleged that the particular goods had not been delivered through the negligence of the Railway Company, but there was no allegation that the goods had been lost A perusal of the judgement in the case clearly shows that if it had been alleged that the title deeds had been actually lost while in transit in the Railway Company, the plea of the defendants would have been a good plea

It has also been argued that the risk note cannot save the defendants unless they show that they took proper care of the package consigned to them In our opinion the present case does not turn upon the construction of the risk note at all The article was clearly one of the articles mentioned in the second schedule and the consignor was bound to declare the value of the article and to pay the percentage mentioned in the section so as to hold the railway company responsible for the loss

In our opinion the appeal fails and is dismissed with costs

Appeal dismissed

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Before Sir Henry Richards Knight Chief Justice and Mr Justice Banerji

LALA (PLAINTIFF) v NAHAR SINGH (DEFENDANT)*

Act (Local) No II of 1901 (Agra Tenancy Act) section 22—"Lineal descendant" — Adopted son

Held, that an adopted son is a lineal descendant within the meaning of section 22 of the Agra Tenancy Act 1901

This was a suit to recover possession of a certain occupancy holding detailed in the plaint, left by one Siya Ram the plaintiff's brother who was said to have died childless about 8 months before the filing of the suit It was alleged that under section 22 of Local Act No II of 1901 the said holding devolved on the plaintiff but that the defendant, who was the daughter's son of the said Siya Ram professing himself to be the adopted son of Siya Ram caused his name to be recorded in the Revenue papers and that the defendant was not in fact and could not have been legally adopted The plaintiff, therefore besides the holding also asked for possession of a house which had been left by Siya Ram It was further stated by the plaintiff that the plaintiff's objection in the Revenue Court had been summarily dismissed. The courts

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* Second Appeal No 1187 of 1911 from a decree of A W R. Cole Additional Judge of Aligarh dated the 22nd of August 1911 confirming a decree of Suraj Narain Majju Munsif of Bulandshahr dated the 11th of May 1911

below dismissed the suit The plaintiff appealed to the High Court

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LALA v. NAHAR SINGH

Dr *Tej Bahadur Sapru*, for the appellant

The respondents were not represented

RICHARDS C J, and BANERJI, J —We think that the court was quite justified in finding that the deceased occupancy tenant, Siya Ram, was a Sudra and could adopt a daughter's son. This being so the only question which remains is whether or not an adopted son is a lineal descendant within section 22 of the Tenancy Act, and in our opinion he clearly is An adopted son is in the eye of the Hindu law just the same as a natural born son. The appeal fails and is dismissed but without costs, as no one appears on behalf of the respondents

Appeal dismissed

Before Sir Henry Richards Knight Chief Justice and Mr Justice Banerji

CHHOTKU RAI AND ANOTHER (PLAINTIFFS) v BALDEO SHUKUL AND OTHERS (DEFENDANTS)*

1912 June 21

Mortgage—Non-payment of greater part of mortgage money—Mortgagee allowed to redeem before expiry of term of mortgage

Certain property was mortgaged by way of conditional sale for Rs 599 15 0 for ten years Of the mortgage money Rs 50 15 0 only were paid and the balance was left with the mortgagees for payment to prior incumbrancers The mortgagees did not pay off the prior incumbrancers and the mortgagor having meanwhile sold the mortgaged property his assignees sued for redemption of the mortgage before the expiry of ten years *Held* that on equitable grounds the defendants not having performed what was a most essential part of the contract the plaintiffs ought to be allowed, to redeem before the expiration of the period of ten years

The facts of this case were as follows —

One Baldeo executed a mortgage by conditional sale in favour of the defendants, second party, on the 21st of August, 1905, for a term of ten years The mortgage money was Rs 599 15 0, out of which only Rs 50 15 0 were paid to the mortgagor and the balance was left with the mortgagees for payment of debts due to prior creditors This amount not having been paid Baldeo transferred the same share to the plaintiffs on the 5th of January, 1906 The plaintiffs brought the present suit against the defendants, second party the mortgagees under the deed of the 21st of August, 1905, seeking to redeem the mortgage on payment of Rs 50 15 0, on

* Appeal No. 128 of 1911 under section 10 of the Letters Patent

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CHHOTKU RAI v BALDEO SHUKUL

the allegation that they had paid the sum of Rs 549 15 0 to the prior creditors of Baldeo and were entitled to redeem The defence of the defendants, second party, was that they had paid the sum of Rs 549 15 0, and in any case that the suit for redemption was premature the period of ten years not having elapsed The courts below without a finding whether the defendants, second party, had actually discharged the prior debts which they had undertaken to pay dismissed the suit on the ground that it was premature the period of ten years not having elapsed. On second appeal, a single Judge of the High Court confirmed the decision of the court below by the following judgement —

The point really in issue in this appeal admits of being stated without going into all the somewhat complicated but not strictly relevant details The proprietor of a one anna share in certain zamindari property executed a mortgage by conditional sale the terms of which were as follows:—

The mortgagees paid Rs 50 15 0 in cash to the mortgagor and covenanted to pay Rs 549 to certain other creditors of the latter The mortgagor covenanted to give the mortgagees possession for ten years and to redeem at the end of that time there was the usual stipulation that failing redemption at the time specified the instrument should operate as a deed of sale The plaintiffs have acquired the equity of redemption in this one anna share They say the holders of the mortgage above referred to have not paid off the creditors in accordance with the stipulations in the deed they accordingly deposit in court Rs 50 15 0 for payment to the mortgagee and sue for possession. The courts below have held that the suit is premature the period of ten years stipulated in the mortgage deed not having expired. The plaintiffs do not contest the general principle that on a deed like the one in question the mortgagee is entitled to claim the benefit of the stipulation ensuring him ten years possession they plead that it is inequitable that the mortgagees should enforce this stipulation when they have not performed their part of the bargain. The principles governing the question in issue are to be found in sections 39 55 and 73 of the Indian Contract Act (Act IX of 1872) a consideration of these sections shows that the courts below were right the mortgagor (or the plaintiffs as representatives of the mortgagor) cannot claim relief against the contract allowing ten years possession to the mortgagee and that the mortgagor s remedy for the loss he is alleged to have suffered is by way of a suit for damages. The contract embodied in the instrument of mortgage cannot be set aside unless the plaintiffs can bring the case within the scope of section 39 or of section 55 of Act IX of 1872 The latter section cannot apply because no time was fixed within which the mortgagees were to pay off the creditors named in the deed Nor can it be said that they have either refused to perform or disabled themselves from performing their promise in its entirety within the meaning of section 39 The plaintiffs case is at most that they have neglected to perform it. So far from refusing to do so their plea on the facts (a plea which the decision of the courts below on the issue of law has prevented them from investigating) was

that they had performed it It cannot be said that the mortgagees have disabled themselves from performing their part of the contract or that it has become impossible of performance within the meaning of section 56 of Act IX of 1872 The case is simply one for a suit for damages This appeal therefore fails and is hereby dismissed with costs

The plaintiffs appealed under section 10 of the Letters Patent On the appeal coming up for hearing before RICHARDS, C J and BANERJI, J, a finding on the issue as to whether the defendants second party had or had not paid the amount which they had under taken to pay, was called for The finding on this issue was in the negative The appeal was then re argued.

Babu *Piari Lal Banerji*, for the appellants, contended that the mortgagees defendants second party were not entitled to resist the claim for redemption on the ground that the claim was premature The reason for enforcing a contract for a fixed term was based on the principle that when a mortgagee had parted with his money on the understanding that he would be allowed to enjoy the usufruct of the property for a fixed term he should not be deprived of the fruits of his bargain by being made to give up the property before the expiration of the period But this equitable rule could not be enforced by a mortgagee who had never parted with his money If a mortgagor in order to save himself and his property makes a mortgage for a long term on the understanding that the mortgagee would pay off his creditors it would be most unfair to allow the mortgagee to retain possession of the property without paying off the prior debts and thus expose the mortgagor to all the risks which he had intended to avoid by making the mortgage If under such circumstances the mortgagee was allowed to resist the claim for redemption it would be a most deplorable consequence to flow from an equitable rule

Babu *Jogendra Nath Mukerji*, for the respondent, urged that the mortgagor was bound by the term fixed just as much as the mortgagee was bound A mortgage when made was not a mere contract, but a conveyance and the mortgagor could not avoid the mortgage simply because a portion of the mortgage money had not been paid. He cited *Rashik Lal* v *Ram Narain* (1) and *Bajrangi Sahai* v *Udit Narain Singh* (2)

Babu *Piari Lal Banerji* was not called upon

(1) (1912) I L R. 34 All. 273 (2) (190.) 11 C W N 932

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CHHOTKU RAI v BALDEO SHUKUL

RICHARDS, C J and BANERJI, J —The vendors of the plaintiffs in this appeal made a usufructuary mortgage in favour of the defendants of the second party The consideration for the mortgage was Rs 599 15 0 All save Rs 50 15 0 were left with the mortgagees for payment of creditors of the mortgagors It has been found as the result of certain issues which we referred to the court below that the creditors were prior incumbrancers of the mortgaged property, and that the mortgagee never discharged the incumbrances The usufructuary mortgage was by way of conditional sale and provided that the property should not be redeemed for ten years The present suit is in form a suit to redeem the property upon payment of Rs 50 15 0, which was the full amount of the consideration given by the mortgagees The defendants second party, contend that the plaintiffs cannot redeem the property or get possession of it until the expiration of the term of ten years and this notwithstanding that the prior incumbrances to meet which the greater part of the consideration was left with them have never been discharged by them Both the lower courts dismissed the plaintiff s suit On second appeal to this Court the decision of the courts below was affirmed

The plaintiffs came here in appeal under the Letters Patent and contend that inasmuch as the defendants, second party, never kept their part of the bargain by discharging the incumbrances which they agreed to discharge, they ought not to be delayed in redeeming or getting back possession of the property until the end of ten years It seems to us that if under the circumstances of the present case the defendants, second party, are allowed to remain in possession of the property over the full period of ten years, taking the profits and allowing the interest on the prior incumbrances to accumulate, the plaintiffs will be without any proper or effectual remedy It is doubtful whether a suit for damages could possibly be brought at the present time and at the expiration of the period of ten years it will only be an effectual remedy if the defendants second party, or their representatives are sufficiently good marks for damages We think that on equitable grounds the defendants not having performed what we deem to be a most essential part of the contract so far as they are concerned the plaintiffs ought to be allowed to redeem the property before the expiration of the period of ten years.

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OHHOTKU RAI v. BALDEO SHUKUL.

We accordingly allow the appeal set aside the decree of this Court and also the decrees of the courts below, and decree the plaintiff's claim for redemption on payment of Rs 50 15 0 The appellants will have their costs in all courts We allow one month for payment of the Rs 50 15 0 mentioned above The decree will be drawn up in the usual form

Appeal decreed

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July 6

Before Mr Justice Banerji and Mr Justice Piggott

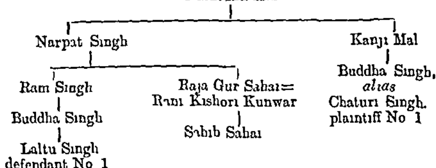
BUDDHA SINGH AND OTHERS (PLAINTIFFS) v LALTU SINGH AND ANOTHER (DEFENDANTS) *

Hindu law—Mitakshara—Succession—Great grandson of the grandfather—Grandson of the great grandfather

According to the Mitakshara law the three immediate descendants of the grandfather succeed in preference to the great grandfather and his descendants and the great grandson of the grandfather is a preferential heir as against the grandson of the great grandfather

The following cases were referred to in the judgements delivered —*Kalian Rai* v *Ram Chandar* (1) *Rutcheputty Dutt Jha* v *Rajunder Narain Rae* (2) *Kashibai Ganesh* v *Sitabai Raghunath Shivram* (3) *Reehava* v *Kalingapa* (4) *Kureem Chand Gurain* v *Oodung Gurain* (5) *Chinnasami Pillai* v *Kunju Pillai* (6) *Bhyah Ram Singh* v *Bhyah Ugur Singh* (7) and *Suraya Bhukta* v *Lakshminarasamma* (8)

This was a suit for possession by right of inheritance of considerable property both movable and immovable which had belonged in his life time to one Sahib Sahai The relationship of the parties to the propositus is shown in the subjoined table —



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* First Appeal No 249 of 1910 from a decree of Gauri Shankar Subordinate Judge of Moradabad dated the 23rd of June 1910

(1) (1901) I L R 24 All 128
(2) (1839) 2 Moo I A 133
(3) (1911) 13 Bom. L. R 552.
(4) (1892) I L R 16 Bom 716
(5) (1866) 6 W R 158
(6) (1911) I L R 35 Mad 152
(7) (1870) 13 Moo. I A 373
(8) (1881) I L R 5 Mad, 291.

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The principal plaintiff was thus the grandson of the great-grandfather of Sahib Sahai, whilst the principal defendant was the great grandson of Sahib Sahai's grandfather The Court of first instance decided in favour of the defendants and dismissed the suit The plaintiffs appealed to the High Court

The Hon ble Dr *Sundar Lal* (with him The Hon'ble *Moti Lal Nehru*) for the appellants —

The conclusion of the court below that the great-grandson of the grandfather is under the Mitakshara, to be preferred as an heir to the grandson of the great-grandfather is opposed to Hindu law The text of Yajnavalkya, II, 136, has been correctly expounded by Mandlik at pp 220, 377 8 and 380 4 of his translation The passages of the Mitakshara which have to be considered are ch. II section 4 pl 1 7 and section 5, pl 1 4 5 अपुत्रस्य means ' of one without male issue तत्सुता means their sons and *not* ' their descendants ' and सन्तान means only such descendants as are entitled to inherit and are mentioned before The great grandson is nowhere mentioned

The following authorities support the appellants —J C Ghose *Hindu Law* 125, 127, West and Buhler, *Hindu Law*, 124 114 116, J N Bhattacharyya *Hindu Law*, 448, S C Sircar, *Vyavastha Chandrika*, Vol I, 178 183, 204, R Sarvadhikari *Hindu Law of Inheritance*, 423 435, Madanaparijata (Sitaram Sastri s translation), 22, G C Sarkar, *Hindu Law* ed. 4 290, Rumsey *Chart of Inheritance* 43, Macnaghten *Hindu Law*, 28, Colebrooke s *Digest of Hindu Law*, vol II, 542, pl 417, Viramitrodaya (Setlur s translation), 420 3

The court below relies upon *Kalian Rai* v *Ram Chandar*, but this case lays down no general principle and is in the teeth of all authorities It is criticized in G C Sarkar, *Hindu Law*, 288 The law is exhaustively discussed in *Chinnasami Pillai* v *Kunju Pillai* (2) and this decision supports me

The Hon ble Pandit *Madan Mohan Malaviya* (with him Dr *Satish Chandra Banerji* and Dr *Tej Bahadur Sapru*) for the respondents —

The general rule is laid down by Manu IX, 186 7 Three generations are in the line of heirs Mandlik s translation of Yajnavalkya, II 135 6, is not correct, च and पुत्र have not been

(1) (1901) I. L. R 24 All 128 (2) (1911) I L R, 35 Mad 152

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translated at all, and तथा should have been connected with भ्रातर The most important word used is तत्पुत्रस्य, and it cannot be disputed that the word पुत्र here includes the great grandson Mandlik, *Yajnavalkya* 222 The Mitakshara does not mention the great grandson specifically (ch I pl 3) but the Viramitrodaya supplies the omission The list of heirs in the older authorities is only illustrative and not exhaustive Consequently the omission to mention any particular heir does not imply his exclusion The daughter s son *e g* is not mentioned in Yajnavalkya's text Sanskrit has a convenient word पितृव्य for the paternal uncle but no similar word to denote the brother of the grandfather or the great grandfather and that is why the texts are not more specific The *sapinda* relation ends at the seventh degree and in Mitakshara, s 5 pl 5, the line is traced 'up to the seventh degree in ascent' Manusmriti V 60 J C Ghose *Hindu Law* 41 57, 58 65 6 78 97 169 170 183-4 The texts of Devala and Parasara cited by J C Ghose show that as far as three generations downwards there is an *identity* of body If the appellant s contention were adopted the great-grandson would find no place among *sagotra sapindas* Yajnavalkya had to indicate the entire range of inheritance in one *anustup* couplet and he used तत्सुतः to denote the issue generally The Mitakshara uses the word पितृसन्तान to indicate the *line* of the father सन्तान is interpreted as continuation *Rachava* v *Kalingapa* (1) Mandlik s authorities as cited on p 360 (Subodhini) and p 364 (Viramitrodaya) are both wrong Mandlik has erred in thinking that only ten heirs are indicated Harrington took a more correct view, though he should have stopped at the fourth degree and not counted up to the seventh Neither abstraction, viz, obstructed or unobstructed inheritance can be the antecedent of तत् पुत्र, but it refers to son, grandson, uncle and brother (पितृ भ्रात्रादि) "And *the like of* the son' is not in the original "Of sons and other descendants of others is mentioned here This is supported by the Subodhini, which has पुत्रपौत्रादयः There is no justification to limit आदि in the way Mandlik limits it His suggestion too regarding error in the passage cited from the Subodhini is not justified, Setlur Mitakshara 590 l, 8 The

(1) (1892) I. L. R. 16 Bom. 716

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Subodhini is commenting on the Mitakshara, ch I, s 1, pl 3 पव तत् पुत्रादिषु अपि उहनोय applies to both obstructed and unobstructed heritage The word पुत्र includes a great grandson Why should the Mitakshara repeat the same thing over and over again? पुत्र पौत्र क्रमश is the ordinary idiom Where the Subodhini is in conflict with the Mitakshara, it must be rejected No reason has been suggested why पितृसन्तान should be limited to the son As to the meaning of the words सन्तान, सन्तति, and सनु, see Sabda Kalpadruma, p 2293, M Williams *Sanskrit English Dictionary* 1057, 1118, Amarkosha II, 7 (Colebrooke s translation, p 175)

The case law supports the respondents —*Rutcheputty Dutt Jha* v *Rajunder Narain Rae* (1) *Bhyah Ram Singh* v *Bhyah Ugur Singh* (2) *Kureem Chand* v *Oodung Gurain* (3) *Oorhya Koer* v *Rajoo Nye Sookool* (4), *Kashibai* v *Sitabai* (5), *Radhey Singh* v *Jholee Singh* (6)

The case in 24 Allahabad was correctly decided, and that in 35 Madras p 152, can be distinguished and goes too far Modern writers also support the respondents contention. Sarvadhikari, *Hindu Law of Inheritance*, 654 656, S C Sircar *Vyavastha Chandrika*, Vol I, 183, J N Bhattacharyya, *Hindu Law*, 447—78, J C Ghose *Hindu Law*, 126 146, Mayne, *Hindu Law and Usage*, 777 A liberal construction should be adopted, *Gridhari Lall Roy* v *The Bengal Government* (7)

The Dayabhaga (Setlur s translation), p 97, was also referred to, and reliance was placed upon Apararka, S Aiyar's translation 41

Where a question of priority arises funeral oblations should also be considered *Suba Singh* v *Sarfraz Kunwar* (8)

The Hon ble Dr *Sundar Lal* replied

Aparark a is no authority in the Benares school and cannot over ride the Mitakshara I do not say that the defendant (great grand son) is not an heir, but he comes under the omnibus clause, K. L. Sirkar *Mimansa Rules of Inheritance* 207 What is true of lineal succession cannot be true of collateral succession because the doctrine of representation does not apply to the latter Logic is

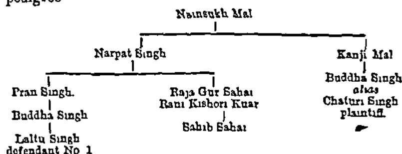
(1) (1839) 2 Moo I. A 132 157
(2) (1870) 13 Moo I A 373 392 393
(3) (1866) 6 W R 158
(4) (1870) 14 W R 209
(5) (1911) 13 Bom. L R 552 557
(6) (18..) S D A (Bengal) 384 at 396.
(7) (1868) 12 Moo I. A 448.
(8) (1896) I. L. R 19 All. 215

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out of place where specific texts have to be applied. If "son" includes grandsons, then a daughter's grandson should come in immediately after the daughter's son. In Mitakshara, II, s. 4, pl. 7, सुत means a son and not a grandson. A Hindu would prefer that his property should go to his grandmother and not to a brother's grandson who might be a baby. Mitakshara, II, s. 5, pl. 2 expressly prohibits the interposition of heirs between the brother's son and the grandmother. The word च shows that the more excellent or preferable rule would be to give her a place immediately after the brother's son. The "compact series of heirs" ends with the latter. The brother's grandson is not in the "compact series" and is therefore only a gentile, Viramitrodaya (Sarkar's translation) 196, 199, K. L. Sirkar, *Mimansa Rules* (T. L. L.) 357, 358. General rules refer to the class previously mentioned in detail, Madanaparijata (Sastri's translation) 22. You can come down two steps, but no more, Sarvadhikari, *Hindu Law of Inheritance*, 510, Gentiles are of three classes, viz. *Sapindas* enumerated and unenumerated, and *samanodaks*, Smritichandrika (Iyer's translation), 188. Apararka is no authority outside Kashmir, J. C. Ghose, *Hindu Law*, 11, Sarvadhikari, *op. cit.* 381. The connection with the fifth descendant stops for purposes of funeral oblations. There is no middle course, one must go up and go down to the seventh degree or not at all. The great grandson comes in under Mitakshara, ch. II, s. 1, pl. 3.

BANERJI, J.—This appeal raises an important question as to the order in which, according to the Benares school of the Mitakshara law, *gotraja sapindas* succeed. The first plaintiff claims the estate of Sahib Sahai as his next heir under the following pedigree:—



The correctness of this pedigree is not admitted on behalf of the defendants, but the case has been decided by the court below

1912 on the assumption that it is correct, and the appeal before us has been argued on the same assumption

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Banerji J

The last male owner of the property in dispute was Sahib Sahai After his death his mother, Rani Kishori Kunwari was in possession till her death in 1907 It is claimed on behalf of the plaintiff Buddha Singh *alias* Chaturi Singh, that he being the grandson of the great grandfather of Sahib Sahai, the last owner, has a preferential right of inheritance as against Laltu Singh, the great grandson of Sahib Sahai's grandfather The other plaintiffs are purchasers of part of the property from Buddha Singh and are apparently financing the litigation

The question to be determined is whether under the Hindu law as prevailing in these provinces, the great-grandfather's grandson succeeds in preference to the grandfather's great grand son The question is not free from difficulty and the authorities are to some extent conflicting

The Mitakshara bases the order of succession on failure of sons and their descendants on the following text of Yajnavalkya 'The wife and the daughters also, both parents, brothers likewise and their sons *gotraja* (gentiles) *bandhu* (cognates), a pupil and a fellow student On failure of the first among these the next in order is indeed heir to the estate of one, who departed for heaven leaving no male issue" (*Aputrasya*) (chap II S I section 1)

In section IV of chapter II the author of the Mitakshara deals with the rights of brothers, and section V lays down the rule of succession of kindred of the same family name, termed *gotraja* or gentiles In section 1 it is stated that the *gotraja* (gentiles) are the paternal grandmother and relations connected by funeral oblations of food and libations of water (*sapinda* and *samanodaka*) Paragraphs 4 and 5 are as follows —

4 * * Here on failure of the father's descendants (*santan*) the heirs are successively the paternal grandmother the paternal grandfather the uncles and their sons '

5 On failure of the paternal grandfather's descendants (*santan*) the paternal great grandmother the great grandfather his sons and their sons inherit In this manner must be understood the succession of kindred belonging to the same general family till the seventh degree among the *sapindas*

The above is the translation of the original given in Setlur's Hindu Law Books on Inheritance and is more accurate than Mr Colebrooke's translation

Relying on the above text the learned advocate for the appellant contends that in the ascending line of heirs the paternal grandfather and his son and grandson succeed after the father, his son and grandson and that after the paternal grandfathers' descendants mentioned above the paternal great grandfather his son and grandson come in that is to say the heirs are the paternal grandfather and his two descendants, and after them the great grandfather and his two descendants and the grandson of the paternal grandfather only comes in as a *gotraja sapinda* under the last clause of section 5 On the other hand it is urged that the word 'son in the above texts includes the grandson and great grandson, that the word *santan* must be taken to include three descendants, and that in computing the heirs in the ascending line three descendants of each ancestor should be computed The former contention has for its support besides the literal words of the texts of the Mitakshara the opinion of Biseswar Bhatt, the author of the Subodhini and the Madan Parijat among commentators and of Mr Mandlik and Mr Golap Chandra Sarkar among modern writers, whilst the latter contention is favoured by the authority of Apararka and Vaijayanti among commentators and of Dr Jolly, Mr Mayne Professor Sarbadhikari and other modern writers to whom I shall presently refer in detail I leave out of consideration the commentators who are of high authority in the Maharashtra and Dravidh schools of the Mitakshara law but do not carry much weight in these provinces The Viramitrodaya which next to the Mitakshara is of paramount authority in the Benares school does not discuss the question but simply repeats the words of the Mitakshara

The question thus turns on the interpretation of the words *santan* and *putra* in *placita* 4 and 5 of the Mitakshara cited above, that is to say, whether by *santan* in *placita* 4 and 5 is meant the descendants specifically mentioned in the preceding paragraphs and the word *putra* is to be taken in the narrow sense of 'son and does not include the grandson. The appellant contends that the enumeration of heirs given in the above paragraphs should be strictly followed and that after the son of the

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Banerji, J

paternal uncle comes the line of the paternal great grandfather He says as stated above that the paternal uncle's grandson is a *gotraja* only under the last portion of paragraph 5

It may be taken as settled that the enumeration of heirs in the Mitakshara is not exhaustive We have therefore to consider whether the word "son" is to be understood in the narrow sense contended for and whether in the case of each ancestor in the ascending line, only two descendants are to be computed

The word *putra* has, it seems to me, been understood in a wide sense In the text of Yajnavalkya beginning with *patni* (wife) &c, cited above the word at the end is *aputrasya* That the word *putra* is used by him in an extended sense and is not limited to the son but also includes the son's son and the son's grandson is manifest This is admitted by Mr Mandlik on p 222 of his work on Hindu law In the translation of the text itself he has retained the word *putra* and in the note relating to it he says —"The word *putra* in this verse stands for son, son's son son's son's son" He refers to the Viramitrodaya and Balambhatta as authorities for this interpretation This is also in accordance with what Manu ordains (chap IX v 187, Sacred Books of the East vol XXV, p 366) in the following text —"To three ancestors water must be offered to three funeral cakes must be given the fourth descendant is the giver of oblations, the fifth has no connection ' So that the participation of the body extends to the fourth descendant, including the *propositus* To the same effect is the following text of Devala — Up to the third degree the members of the family *are of the same body*' (Ghose's Hindu law 2nd edition p 97) Parasara says that ' the separation of the body accrues to the fifth person born of one's family ' (Ghose p 57) Jimutavahana quoting Manu, Vishnu Harita Yajnavalkya Sankha and Likhita says that ' the term *putra* stands for descendants up to the son s son s son.' Mandlik's Hindu law p 381 Vijnaneswara the author of the Mitakshara has also used the word *putra* in the same sense In chapter I, S. I, paragraph 3, treating of obstructed and unobstructed inheritance he says with reference to sons and grandsons, &c., that the rule should be inferred in respect of *their* sons' Both Balambhatta and the author of the Subodhini are of opinion that the word ' their

(*tat*) in the above passage refers to the grandson, &c., so that the grandson includes the great grandson. Again, chap. II, section I, of the Mitakshara is headed "Right of the widow to inherit the estate of one who leaves no *putra* (*aputrasya*)." There can be no doubt that the word *putra* here also includes the grandson and the great grandson. Similarly, in section 4 of the same chapter the word seems to have an extended meaning. So that the author of the Mitakshara has generally used the word *putra*, wherever it occurs, in the sense of including the two immediate descendants of the son in the direct line. There is apparently no reason for holding that he has used the same word in a restricted sense in section V, paragraphs 4 and 5. It seems that having used the word *putra* in other places in an extended sense he considered it unnecessary to state that he used it in the same sense in the chapter in question also. The view contended for will, it seems to me, militate against the general scheme of succession laid down in the Mitakshara. In the case of the owner himself, his son, grandson and great grandson succeed one after another, that is, down to the third degree. They take before the parents, and therefore it is reasonable to conclude that the same rule applies to the descendants of the father and the grandfather. There is apparently no reason to limit the line of descent to two descendants only in the case of the father and the grandfather, and it does not seem that the author of the Mitakshara intended to do so. If such was his intention one would expect that he would state some reason for putting a restricted meaning on the word *putra* in the case of the father, the grandfather and other ascendants, although that word had been elsewhere used by him in the sense of including the grandson. Under the Mitakshara *sapinda* relationship depends on participation in particles of the same body and propinquity is the rule of inheritance. It is to the nearest *sapinda* that the inheritance goes. Therefore the three descendants of the father being nearer *sapindas* than the three descendants of the grandfather, and the three descendants of the latter being nearer than the three descendants of the great grandfather, the three descendants of the father inherit before the descendants of the grandfather and his three descendants inherit before those of the great grandfather. This is perfectly consistent with the rule of the Mitakshara. If Vijnaneswara intended to lay down a different rule he would not have used the word

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santan in paragraphs 4 and 5 of section V That word has a wide meaning, and in the English translation of Amarkosh its equivalent is 'lineage,' 'race The use of that word may fairly be regarded as an indication of the idea that the descendants of the father and the grandfather, &c, are not to be limitted to two degrees only but should include the great grandson who is the last man in the series of those who are of the same body according to Manu and other ancient Hindu lawgivers

The learned advocate for the appellant chiefly relies on the position which he contends is given in the Mitakshara to the grand mother, that is immediately after the brother s son, and he urges that the persons mentioned by name are indicated as the heirs who would come in after the paternal grandmother As to this it seems to be extremely doubtful whether the author of the Mitakshara intended to bring in the paternal grandmother after the brother's son and before his grandson In paragraph 2 of section V he was considering the question whether the grandmother would come in immediately after the mother He expressed the opinion that she does not do so that her place in the order of inheritance is after the ompact series of heirs from the father to the brother s son and " that the highest place which can be assigned to her (*utkarshe*) was after the brother s son' If this placitum be read with the general context and be considered in connection with the whole scheme of succession according to the Mitakshara and with the meaning of the word *putra* ' as understood in other chapters, it would not, in my opinion support the appellants argument to the extent contended for and the grandmother would inherit after the brother s descendants and just before the paternal grandfather The expression compact series of heirs' in section 2 apparently refers to the series of heirs mentioned in Yajnavalkya's text quoted above and not to the heirs mentioned in chapter V of the Mitakshara

It is also urged that if son includes the grandson the daughter s grandson would succeed after the daughter s son. The answer to this is that the daughter s son succeeds because he is assigned a particular place by Yajnavalkya in the text quoted above otherwise he would have succeeded as *bandhu* This cannot be said of the daughter s grandson, who is not mentioned in the text.

The learned advocate also relied upon the Subodhini and the Madanparijat as supporting his contention that the great grand father and his descendants succeed after the grandfather's grand son, i.e. the paternal uncle's son. The latter of the two authorities only recites the words of the Mitakshara literally. The Subodhini, no doubt at one place says that the brother's grandson does not succeed after the brother's son, but in the case of unobstructed and obstructed inheritance it would include the son of the grandson in the line of heirs (Mandlik's Hindu Law, p 382) Besides, the author of that work would include females among *gotraja* heirs, which is admittedly not the law in the Benares school.

On the other hand Apararka and Vaijayanti clearly support the view that the grandson of the paternal uncle succeeds before the line of the great grandfather comes in.

Mr Mandlik and Mr Golap Chandra Sarkar adopt the list of heirs specifically mentioned in the Mitakshara and would not extend the line of the father and the grandfather to three degrees of descendants but would limit them to two.

On the other hand Professor Sarbadhikari (Tagore Law Lectures, 1880) would extend the list of heirs to three degrees of descendants in each case. He points out that there are fourteen classes of *sapinda* heirs four of whom are propinquous *sapindas*. The first of these are the three immediate descendants of the deceased. The next class consists of the mother, the father and their three immediate descendants. In the third class are the grandmother, the grandfather and their three immediate descendants. The fourth class consists of the paternal great grandmother and the great grandfather with their three immediate descendants (p 654). He gives a complete table of *sagotra sapinda* heirs on p 656 assigning in the ascending line the order of succession to each ancestor and his three immediate descendants. In this respect he differs from Mr Mandlik, who gives the right of succession to two descendants only (See table on p 378) Dr Jolly adopts the same view as Mr Sarbadhikari (Hindu Law pp 210 and 212). The table of heirs given by him is on the same lines as that of Mr Sarbadhikari, and he gives to the grandfather's great grandson the 17th place, while he assigns the 21st place to the great-grandfather's grandson. Mr Mayne in his well known work (7th edition, p. 777)

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mentions the grandfather's successors as being "issue to the third degree inclusive"

In the Vyavastha Chandrika, vol I p 183, the great grandson of the paternal grandfather, that is the grandson of the paternal uncle is included. Messrs West and Buhler also think (p 124) that the descendants of the grandfather must be exhausted before the great grandfather's line can come in. The opinion of Mr Bhattacharya (2nd edition, pp 444 to 448) is that the three immediate descendants of the grandfather succeed before the great grandfather. Referring to his opinion and that of Professor Sarbadhikari, Mr J C Ghose in his work on Hindu Law, (2nd edition, p 148) says — 'This rule is in accordance with the later theory of *sapindaship* and probably more consistent with the principle of propinquity. The weight of the authority of commentators and text writers is thus in favour of the respondent. It is said in regard to Apararka's opinion that it is based on the theory of spiritual benefit which is inconsistent with the Mitakshara theory of *sapindaship*. The Viramitrodaya, however, which, next after the Mitakshara, is of great authority in the Benares school, regards superior spiritual benefit as a determining factor in cases of competition, and this seems to have been the opinion of Their Lordships of the Privy Council [*Bhyah Ram Singh* v *Bhyah Ugur Singh* (1)]. However, it is not necessary to go into that question, because, as observed by Mr Ghosh (p 147), *sapinda* relationship is "based on the identity of the body of the father, son, grandson and great grandson.'

The preponderance of the case law on the subject is also in favour of the respondents. In *Kalian Rai* v *Ram Chandar* (2), a bench of this Court held that the word 'son' in the Mitakshara includes 'grandson,' and therefore the brother's grandson is a nearer *sapinda* than the son of the paternal uncle. The exact question now before us was not decided in that case, but the principle laid down applies equally to the present case. The authorities were referred to and discussed and the conclusion arrived at was that the Mitakshara was not to be understood in a restricted sense when using the words *putra* and *santan*, and that those words include the grandson also. The opinion of Mr Harrington in the

(1) (1870) 13 Moo I. A., 373.

(2) (1901) I. L. R. 24 All 128.

case of *Rutchepully Dutt Iha* v *Rajunder Narain Rae* (1) was considered and approved That opinion has been adversely criticized by Mr Mandlik (pages 380 383) With much of this criticism I am unable to agree The weight of authority as pointed out above is in favour of the view that the line of each ancestor down to the three immediate descendants must be exhausted before the next ancestor and his descendants can come in In so far as Mr Harrington extends the line to six degrees, he has apparently gone too far, but that is no reason for rejecting the theory he enunciates, the principle of which is, in my opinion fully borne out by authority

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The decision of this Court, in the case mentioned above appears to have met with the approval of the Bombay High Court in *Kashibai Ganesh* v *Sitabai Ragunath Shiiram* (2) In *Rachaia* v *Kalingapa* (3) Mr Justice TELANG referring to the Mitakshara chapter II section V, *placita* 4 and 5, observed that it was laid down that ' the propinquity of *gotrajas* is to be determined by lines of descent, that is to say, the inheritance is to go first in the line (the word in the original is *santana* literally ' continuation') of the paternal grandfather, then in default of any one in that line of the paternal great grandfather and so forth ' The learned Judge understood the word *santana* in an extended sense and in his opinion the line of the grandfather was to be exhausted before the great grandfather and his line came in, so that this decision may be regarded as an authority supporting the case of the respondent

In *Kureem Chand Gurain* v *Oodung Gurain* (4) which was a Mitakshara case, the Calcutta High Court approved of Mr Harrington s opinion and recognized the right of the brother s grandson The Madras High Court has held the contrary view The most recent case on the point is that of *Chinnasami Pillai* v *Kunju Pillai* (5) where it was held that the word "son in the Mitakshara, chapter II, does not include the grandson. The learned Judges seem to have based their decision on what they regarded as " the consensus of opinion among lawyers dealing with the Mitakshara school of law as prevalent in this (Madras) presidency For the reasons already stated I am unable to agree with the learned Judges

(1) (1839) 2 Moo. I. A. 433. (2) (1911) 13 Bom. L. R 552.
(3) (1892) I. L. R. 16 Bom. 716. (4) (1866) 6 W R. 158
(5) (1911) I L. R. 35 Mad. 1 ?

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and to dissent from the view taken in this Court in *Kalian Rai* v. *Ram Chandar*. In my opinion on principle and on the authorities the view adopted in that case is correct.

Upon a true interpretation of the text of the Mitakshara and on the authorities referred to above I hold that the three immediate descendants of the grandfather succeed in preference to the great grandfather and his descendants and that the great grandson of the grandfather is a preferential heir as against the grandson of the great grandfather. The defendant, Laltu Singh, is therefore the next heir to Sahib Sahai and the plaintiff's claim has been rightly dismissed. I would dismiss the appeal with costs.

PIGGOTT, J.—This is a suit for possession in respect of property, both movable and immovable, of very considerable value of which the last full owner was one Sahib Sahai, who died in July, 1873. Possession has since been with his mother Rani Kishori Kunwar, and the succession opened on the death of that lady in the month of August, 1907. The suit is based upon a pedigree according to which the first plaintiff Buddha Singh *alias* Chaturi Singh, is the grandson in the male line of one Nainsukh Mal, who was the paternal grandfather of Raja Gur Sahai (or Gauri Sahai) husband of Rani Kishori Kunwar and father of Sahib Sahai. The plaintiff's own pedigree shows that Laltu Singh (defendant No. 1) is the grandson in the male line of Puran Singh, own brother of Raja Gur Sahai. The defendants did not admit the plaintiff Buddha Singh to be in fact the son's son of Nainsukh Mal, but this issue of fact has not at present been tried out. The learned Subordinate Judge has held in effect that, whatever doubt may exist elsewhere on the question of Hindu law involved, the decision of this Court in the case of *Kalian Rai* v. *Ram Chandar* (1) was binding upon him and was sufficient authority for the proposition that Laltu Singh as the grandfather's great grandson of Sahib Sahai was a nearer heir to that gentleman under the Hindu law of the Mitakshara school than Buddha Singh alias Chaturi Singh, even supposing the latter to be able to prove himself to be the grandson of Sahib Sahai's great grandfather, all the relationships referred to being of course in the direct male line. There was some little discussion before us at the commencement of the hearing as to the convenience of the course thus adopted by the court below, but it is to be noticed that

(1) (1901) I. L. R., 24 All., p. 128.

the plaintiffs have not made it a plea in their memorandum of appeal that they desired an issue to be remitted upon the question of fact and it seems clear that the learned Subordinate Judge acted as he did with the acquiescence if not with the express consent of both parties We thought it best therefore to accept the position as it stood and we have had the advantage of hearing the question of law argued out at length with the assistance of an army of counsel on both sides exceptionally well qualified if I may take the liberty of saying so, to assist the Court in arriving at a correct conclusion

Much of the argument centered round Mr V N Mandlik s exposition of the Hindu Law of Succession contained in his commentary on the 'Vyavahara Mayukha and I find it convenient to turn at once to the table given by that learned author at page 378 of his work quoting from the edition of 1880 We have exhausted in this case the line of the *propositus* himself and that of his father, and the question is as to the steps to be followed in order to arrive at the next heir amongst the *gotraja sapindas* There is no grand mother or great grandmother to be considered in this case and I need not complicate the question at this stage by considering the position assigned to these ladie or to other female heirs of the same class Broadly speaking Mr Mandlik s principle as applied to the facts of the present case is to ascend to the line of the grandfather, to follow this downward for two generations only, that is to say, as far as the grandfather s son s son (that is to say the first cousin of the *propositus*) and then to ascend to the next generation and take the line of the great grandfather This is similarly followed for two generations only before ascending to the line of the grand father s grandfather and the process is continued to the sixth in ascent from the *propositus* (the great grandfather s great grand father) after which Mr Mandlik returns once more to the lower generations continuing each line in turn until he reaches the sixth in descent, either from the *propositus* himself or from the common ancestor in each case It is this table together with the authorities upon which it purports to rest which forms the basis of the appellant s case It places the plaintiff Buddha Singh as great-grandfather s grand on eighteenth in the order of succession while the defendant Laltu Singh as grandfather s great grand on stands only thirty eighth He is postponed not merely to Buddha Singh, but to such hypothetical heirs as grandfather s first cousins, as

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well as to the practically inconceivable heirs arrived at by ascending two generations higher still, who appear as numbers 24 to 32 inclusive in Mr Mandlik's table

As against this scheme of inheritance, which I may refer to for convenience sake as Mr Mandlik's, there have been laid before us two other schemes or theories, which I propose to speak of as Mr Harrington's and Mr Sarvadhikari's The former was expounded by Mr Harrington of the Sudder Dewani Adalat in the case of *Rutcheputty Dutt Jha* v *Rajunder Narain Rae* as long ago as 1839, vide 2 Moore's Indian Appeals, p 133 It goes on the principle of exhausting the line of each ascendant down to the sixth person in direct male descent before taking another step in the upward line As applied to the facts of the present case, this principle would exhaust the line of Sahib Sahai's grandfather, not merely down as far as his great-grandson, the defendant Laltu Singh, but if necessary, three generations further, before seeking for an heir in the line of Sahib Sahai's great grandfather The principle laid down by Mr Sarvadhikari, and arrived at independently by Dr Jolly in his 'History of Hindu Law (at p 212), lies between these two It would follow Mr Mandlik's plan in its general outline but would carry the descent in each case one step further, namely, to the great grandson of the common ancestor concerned. Thus in the present case the line of Sahib's grandfather would have to be carried down to that gentleman's great grandsons, and would thus reach the defendant Laltu Singh, before any attempt was made to search for other possible heirs by ascending to the line of the great grandfather in order to reach the plaintiff Buddha Singh.

The defendants of course stand to win this case if the court will accept either Mr Sarvadhikari's or Mr Harrington's scheme of succession but their learned advocate was inclined to press the former upon our acceptance rather than the latter For purposes of argument however I prefer to consider Mr Harrington's first. I do not propose to transcribe the ancient texts on which the argument turns the most important of them have been set forth in the judgement of the lower cour The essential point is the interpretation to be placed on the fifth section of the second chapter of the Mitakshara We must go back, however, to the beginning of the chapter in order to remind ourselves that we are dealing with "the estate of one who departed for heaven leaving no male issue"

vide Yajnyavalkya, chapter II, section V, 137 as quoted in the Mitakshara itself The word used here is "*aputrasya*, and it is common ground that as used in the particular place and in this particular context the word does not mean a man who has left no sons surviving him, but means at least a man who has left no son, grandson or great grandson in the male line Mr Harrington would take it broadly as meaning a man who has left no lineal descendants in the direct male line The first four sections of the chapter deal with the succession of the estate of such a man as far as the exhaustion of his father s line we then come to the fifth section introduced by the words "if there be not even brother s sons, gentiles share the estate Amongst these the ancient author proceeds to put the paternal grandmother first and he diverges into a curious exposition of his reasons for so doing He then explains the general distinction which he draws between gentiles (*sapindas*) and cognates (*bandhus*) and finally returns to his table of succession at the fourth sub division of the section. Thus, he says, on failure of the father s line (*santan*) the succession goes to the paternal grandmother the paternal grandfather, the uncles and their sons The next sub division gives the succession "on failure of the paternal grandfather s line' to the paternal great grandmother, the great grandfather, his sons and their issue and provides further that this is the way in which the succession of *gotraja sapindas* is to be reckoned ' up to the seventh degree After this we are to make a fresh start in search of kindred connected by libations of water, and the principle laid down appears to be that we are to resume the same process and carry it to the seventh degree beyond that already reached, " or else as far as the limits of knowledge as to birth and name extend The great point in favour of Mr Harrington s scheme of succession is that it avoids making a fresh start until the necessity for so doing is clearly indicated by the ancient text itself It carries out one single and consistent process up to the dividing stage marked by the end of pl 5, and it then proceeds to follow the directions of pl 6 by carrying a precisely similar process six degrees further It rests upon the contention that the word "son or "issue ' wherever they occur in this section must be interpreted in accordance with the general context, and must be governed by the use of the word "*santan*'

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at the beginning of pl 4 and pl 5, as well as by the gener direction to carry the entire process 'up to the seventh degree That there is authority for the use of the word " ons' in oth parts of the Mitakshara so as to include at least the sons an grandsons of such sons is not denied, the contention for the appe lants is that this use is only to be accepted where there are expre words in the text itself to authorize such an interpretation Th argument in favour of Mr Harrington's scheme I would state being that the interpretation of such words as " sons and 'issue should be governed in each case by the context as a whole and th the context in the present case is such as to justify, if not nece sitate, an interpretation which will carry the direct line descent downwards to the limit of the seventh degree' pr scribed by pl 5 I understand that Mr Harrington, in orde to give symmetry and completeness to his scheme of inheritanc would propose formally to place the lineal descendants of th *propositus* in the main line down to the seventh degree (i e, dow to the great grandson of the great grandson) first in order, befor ascending to the line of the father at all, and would similarly ex haust the line of the father down to the grandson of a great gran son of a brother of the *propositus* before ascending to the gran fathers line This has been made a matter of serious objectio against the entire scheme by Mr Mandlik and other Hindu critic They contend that on the ancient texts themselves there can be n doubt that the ascent to the fathers line (I am passing over fo purposes of argument the rights of the wife the daughter th daughter s son and the mother) commences as soon as the line o the *propositus* has been carried down to his great grandson Moreover they lay particular stress on the position of the gran mother contending (and this is an argument used both again Mr Harrington s scheme and against that of Mr Sarvadhikar that it is quite clear from section V, pl 2 of the se on chapter of the Mitakshara that the paternal grandmother succeed immediately after the brothers son. These arguments are no without real weight but I concede that there is much to be sai by way of rejoinder One cannot deal with an ancient text lik that of the Mitakshara precisely as one would with a modern A of Parliament. I cannot feel that it is a conclusive argument

against a scheme of inheritance which is really intended to apply when one reaches the *gotraja sapindas* after the exhaustion of the father's line, that it involves by analogy the assigning of a place in the line of succession to such improbable heirs as the great grandson or the brother's great grandson of the *propositus*, such as does not seem to be strictly warranted by the ancient text The text relating to the paternal grandmother represents what the author of the Mitakshara felt to be a difficulty not to say an anomaly about the older scriptures on which he was commenting It is at least open to argument whether on a correct rendering of the original the author's meaning should not be taken to be that the paternal grandmother can only come in at best or ' at the highest after the brother's son In any case the argument, to some extent at least begs one of the most critical questions in issue that is to say whether the expression "brother's son" in this very passage may not include the descendants of the brother in the direct male line either to the third or to the sixth degree

I now pass on to consider Mr Sarvadhikari's scheme In order to the due appreciation of this it is necessary to go right back to the original text of Manu which is the foundation of the Hindu law on the question I quote from Manu III 216 as translated by Mr Ghose at p 66 of his book on Hindu law — To the three ancestors water must be offered to three the funeral cake (*pinda*) is given, the fourth (descendant) is the giver of these (oblations), the fifth has no concern (with them) The way in which this text has been understood and applied by subsequent commentators can best be understood if we start with a series of seven descendants in the direct male line in which our *propositus* occupies the middle place He offers the mystic funeral cake to three ancestors *i e* to his own father, paternal grandfather and paternal great grandfather, similarly he has three descendants who make the same offering to him, namely his son, his son's son and his great-grand son the son of his son's son By the "fifth who has no concern is to be understood the fifth person in the descending series reckoning the *propositus* himself as the first that is to say, the fifth person would be the great grandson's son. In the table at page 378 of Mr Mandlik's book to which I have already referred we find as the basis of the scheme of inheritance a series not of seven,

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but of thirteen, descendants and ascendants in the direct male line, with the *propositus* or "deceased owner" in the centre This is presumably because of the interpretation which all Hindu lawyers appear to have placed on the expression "up to the seventh degree in the Mitakshara, chapter II, section V, pl 5 The series itself stands connected with the *propositus* not only by the offering of water spoken of in the text of Manu, but by the fact that the great grandfather offers the funeral cake to his own great grandfather, and the great grandson receives the same offering from his own great grandson The general principle has been laid down (vide Mayne s Hindu Law at page 777 of the VII edition) that 'so far as the issue of each ancestor are his *sapindas*, they are also the *sapindas* of the person with whom they are connected through that ancestor From these considerations Mr Sarvadhikari deduces a theory of nearer and more remote *sapindas* according to which the "nearer line comes to an end in each case with the great grandson of the *propositus* himself and of each male ancestor in the ascending line in turn, the search for more 'remote' *sapindas* is then recommenced with the great-grandson s son of the *propositus* himself and continued as already explained The theory finds support from a passage from Visvesvara referred to at page 382 of Mr Mandlik s book, which has evidently puzzled that learned author so much that he can only get away from it by suggesting some misreading in the manuscripts now available, a suggestion which later research has apparently quite failed to bear out The advantage of this scheme over Mr Harrington s is that it begins the ascent in strict conformity with the letter of the ancient texts after the great grandson of the *propositus* and that it can quote more direct authority for understanding the word sons as including the sons and grandsons of such sons than is available in support of Mr Harrington s theory that the descendants of such sons to the sixth degree should be deemed to be indicated I do not say that this argument altogether meets to my mind the contention that Mr Harrington s scheme is based upon the general context of the section of the Mitakshara in question (chapter II section V) read and considered as a whole but it is certainly not without weight. As the matter presents itself to my mind, a very important question is whether

this scheme of Mr Sarvadhikari s is or is not open equally with Mr Mandlik s to an objection which I have already suggested Does it or does it not involve making a fresh start at a point where no fresh start is indicated by the text of the Mitakshara itself? As formulated or at any rate as presented to us in argument it seems to me that it does I venture to throw out the suggestion however that this objection as applied to Mr Sarvadhikari s scheme turns rather upon a question of terminology Would the learned Hindu lawyers who support this scheme of inheritance be content to admit that the heirs arrived at by making a fresh start after the great grandson of the great-grandfather s great grandfather come in under pl 6 as ' kindred connected by libations of water? If this be done and if we interpret the words ' to the seventh degree in pl 5 as meaning up to the seventh degree in the ascending line of ancestors it seems to me that we arrive precisely at Mr Sarvadhikari s scheme or table of succession upon a strict and consistent interpretation of the text of the Mitakshara and subject only to the condition that we bring in the entire line of what Mr Sarvadhikari calls the ' remote *sapindas* by virtue of pl 6 and not under pl 5 of the text before us I leave it to Hindu lawyers to say whether this suggestion is hopelessly unacceptable because doing too great violence to the accepted meaning of the term *sapindas* though I cannot refrain from remarking that the arguments before us seemed to disclose abundant instances of varying usage now stricter and now looser in respect of this particular term.

I have now said enough to have indicated incidentally the essential basis of Mr Mandlik s theory and the line of argument upon which it is based It involves a strict and literal interpretation of the word ' sons ' or ' issue wherever they occur in section V of chapter II of the Mitakshara. It is as if we were to presuppose a second series of ' enumerated heirs given a preferential right amongst the *sapindas* themselves by virtue of the fact that they are specifically mentioned in the text itself while the position of others is left to be deduced by inference and analogy These would be the paternal grandmother, the paternal grandfather his sons (' the uncles) and his grand-sons (their " i e the uncles sons), then the ' paternal great grandmother the

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great grandfather, his sons and their issue'—the latter expression being understood strictly as being the sons of such sons." The Madras High Court, which is the one modern authority clearly on the side of Mr. Mandlik's theory, has gone the full length of accepting these persons as "enumerated heirs," in the same sense apparently in which that expression is used elsewhere of the "compact series of heirs from the father to the nephew" spoken of in the Mitakshara ch. II sec. V, pl. 2—*vide Chinnasami Pillai v. Kunju Pillai* (1). It matters not for the purpose of this particular case that the "enumeration" strictly so called ceases with the line of the great grandfather, and that Mr. Mandlik himself has to continue his table of inheritance from this point by way of inference and deduction. The fact remains that a son of a great grandfather's son is specifically mentioned in pl. 5, while the place in the line of succession of a grandfather's great grandson must be determined by analogy upon one or other of the theories before us. If this specific mention is to be accepted as decisive in spite of any other arguments in favour of Mr. Sarvadhikari's scheme or of Mr. Harrington's there is undoubtedly an end of the matter and the decision of the court below on the issue of law involved must be reversed.

I pass on now to consider the competing theories before us in the light of authority. It was very strongly urged upon us in the final argument addressed to the Court on behalf of the appellants that we should by no means base our decision upon any interpretation which we might ourselves feel disposed to put upon the text of the Mitakshara even after considering that text in the light of opinions expressed by the most eminent modern commentators or in view of analogies drawn from published decisions of English courts. We are asked to decide simply what is the interpretation put upon the text of the Mitakshara by those ancient commentators who are the accepted authorities upon that school of law as prevailing in these provinces. I wish to make it clear that I fully appreciate the force of this argument. Had the very learned and able advocate for the appellants succeeded in satisfying me that there was a clear and unmistakable consensus of opinion amongst such commentators upon the particular point in issue I should undoubtedly have felt it my duty to accept this consideration

(1) (1911) I. L. R. 35 Mad. 152.

as decisive My learned colleague is better qualified than I am to appreciate the precise force of this argument as it was developed in detail, and if it failed to convince him I can feel no scruples on the point myself It seemed to me that neither clear unanimity nor unmistakable certainty of decision in respect of the particular point before us on the part of the authorities cited was made out In some cases the commentaries quoted simply reproduced the text of the Mitakshara, with little or no variation and nothing in the way of comment that had any bearing upon the issue we are considering It did not appear to me that more than one authority the 'Madana Parijata' (S Sitarama Sastri s translation) expressed itself with anything approaching certainty in favour of Mr Mandlik s view Nowhere did I find anything like a complete examination of the entire section of the Mitakshara with a view to deducting therefrom a definite and unambiguous scheme of succession amongst the "gentiles" I cannot accede to the view that the question before us is concluded by a clear consensus of opinion amongst the most ancient authorities of the Mitakshara school

There is no reported decision of their Lordships of the Privy Council which can be regarded as turning upon or finally determining this particular point It is to be noticed however, that what I have spoken of as Mr Harrington s scheme was formulated in a case which went up to their Lordships and it is scarcely putting the matter too strongly to say that it received their tacit endorsement Indeed in a subsequent case *Bhyah Ram Singh* v *Bhyah Ugur Singh* (1) though here again the actual point for decision was different Their Lordships seem to have expressed approval of the position that Mr Harrington s views had received a general endorsement from their authority The Madras High Court has been on the side of the appellants The recent case which I have already quoted refers back to an older decision of the same Court in *Suraya Bhukta* v *Lakshminarasamma* (2) where Mr Harrington s opinions in *Rutcheputty Dutt Jha* v *Rajunder Narain Rae* (3) are treated as *obiter dicta* which in a strict sense they undoubtedly were and a clear finding is given in favour of the succession of a paternal uncle s son before a

(1) (1870) 13 Moore s I A., p. 373 (2) (1881) I L. R. 5 Mad., p 291

(3) (1839) 2 Moo. I. A., p 133

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brother's grandson. This, however, is precisely and definitely contrary to the decision of two Judges of this Court in the case relied upon by the court below, *Kalian Rai* v. *Ram Chandar* (1), and we are bound at least to give the decision of our own Court the greater weight. It was contended before us that this decision does not purport to proceed upon the definite adoption of any one principle or scheme of succession, and that the learned Judges responsible for the same were careful to limit themselves to the particular issue before them. I think it is true that they refrained from saying that in their view the brother's grandson must necessarily come in under section IV of chapter II of the Mitakshara, but contented themselves with holding that under section V he would be a nearer heir than the uncle's son, assuming both to take only as 'gentiles' under that section. I think it would perhaps be open to us to say that we are not necessarily bound to carry the principle affirmed in *Kalian Rai* v. *Ram Chandar* a step further into the next generation in the ascending line, but I do not see any possible line of reasoning upon which we could find for the appellants in the present case which would not involve a finding that *Kalian Rai* v. *Ram Chandar* was wrongly decided. Finally I may note that the Bombay High Court is almost as clearly against the appellants as the Madras High Court is in their favour. In the recent case of *Kashibai Ganesh* v. *Sitabai Raghunath Shivram* (2) much of the older case-law on the subject is reviewed and the great authority of Mr. Justice TELANG is quoted for the proposition that—'The inheritance is to go first in the line (the word in the original is *santana*, literally 'continuation') of the paternal grandfather, then in default of any one in that line of the paternal great grandfather, then of the paternal great great grandfather and so forth.' *Vide Rachava* v. *Kalingapa* (3). I come therefore to the conclusion of the whole matter upon a general review of arguments and authorities. It is perhaps difficult for an English judge to clear his mind altogether of some antecedent prejudice in favour of Mr. Harrington's scheme. The English law is clear that in any question of inheritance through males the remoter ancestor and his descendants are excluded by the nearer ancestor or by his descendants how low soever. On

(1) (1901) I. L. R. 24 All., 1 8.

(2) (1911) 13 Bom. L. R. [illegible]

(3) (1892) I. L. R. 16 Bom. 716.

learned author, Mr Golap Chandra Sarkar Sastri (vide p. 219 of his work in the IVth edition) in adversely criticizing the decision of this Court in Kalian Rai v. Ram Chandra, has been somewhat severe upon our Judges for having (as he seems to suggest) allowed themselves to be influenced by English rather than Hindu ideas of propinquity in relationship. His remarks suggested to my mind the putting of the question actually before us to the test of personal experience. My "grandfather's great grandson" sounds a somewhat formidable person when you put him to me in that way, but coming to disentangle him I find that I know him well. He is the son of my first cousin, a member of a family which I know well, a lad for whom I feel much natural affection. As for my great grandfather's grandsons, the sons of my grandfather's brothers I frankly do not know whether or not any such persons now walk this earth. Is the idea of propinquity involved in the Hindu text that "to the nearest sapinda the inheritance next belongs," really different when you come to relations so far removed in degree, from that upon which the English rule of inheritance is based, and which I find to be strikingly illustrated by the case of my own family? I take leave to doubt it.

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Of the schemes of inheritance which we have discussed Mr Harrington's seems to me the simplest and most consistent. I do not believe that it does any real violence to the ancient text upon which it is based and it seems to me to have behind it a weight of modern authority beyond that which can be claimed for the other two. On the other hand Mr Sarvadhikari's scheme attracts me by the suggestion that it is in closer conformity with essentially Hindu ideas as going back for its basis to the most ancient authority upon which the Hindu law on the subject is based. Subject to the considerations which I have suggested when discussing it I think it may claim equally with Mr Harrington's to satisfy the requirements of section V, chapter II of the Mitakshara read as a whole. If the suggestion which I have ventured to make regarding it is considered admissible by Hindu lawyers of the modern school I would prefer Mr Sarvadhikari's scheme—regarded merely as a system deduced from the text of the Mitakshara to Mr Harrington's, otherwise I think it open to an objection which would throw back my preference to the older system propounded by the English Judge. I would unhesitatingly

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prefer either of these schemes to Mr Mandlik s' With all respect to the learned authors and Judges who accept this last, I would say that the scheme rests upon a pedantically literal interpretation of the words ' sons and ' issue " which is at variance with the context of the section read as a whole, and that its logical development does violence to the great principle that ' to the nearest *sapinda* the inheritance next belongs '

I would therefore dismiss this appeal with costs

BY THE COURT —The appeal is dismissed with costs

Appeal dismissed

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Sarsuti v Kunj Behari Lal I L R 5 All 345 followed 145
Sartaj Kuar v Deoraj Kuar I L R 10 All, 272 referred to 153
Secretary of State for India v Krishnamoni Gupta I L R ?9 Calc 518 referred to 65
Shafi un nisa v Fazl Rab 7 A L J, 78? distinguished 643
Shambati Kueri v Jag Bibi I L R, 29 Calc, ?49 L R, 29 I A 12? followed
Shamrathi Singh v Kishan Prasad I L R 29 All, 311 referred to 403
Sheikh Akbar v Sheikh Khan I L R 8 Calc 256 referred to
Sheikh Ibrahim Tharagan v Rama Iyer 21 M L J, .03 referred to 161
Sheo Dayal Tewaree v Judoo Nath Tewaree 9 W R, 61 distinguished 5 0
Sheo [illegible] v Beni Madho I L R 23 All ?85 referred to .10
Sheo Persha! Singh v Saheb Lal I L R, ?0 Calc 453 referred to 4
Sheoraj Roy v Chatter Roy I L R 32 C [illegible] .68 followed 139
Sherdas Daulatram Marwadi v Narayen valad Anaji L L R, 33 Bom ?? dissented from 4.1
S[illegible] bi moondery Dabia v Russomutty Dabia, I L R 7 Calc 191 distinguished 5?? 351
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Smith v Lloyd 9 Ex 5?? referred to 419
Subhag-hand Gura chand v Bhaichand I L R 6 Bom 1?3 referred to 643
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Soiru Padmanabh Rangappa v Narayanrao bin Vithalrao I L R, 18 Bom 5⁰9 referred to 138
Sornavalli Ammal v Muthayya Sastrigal I L R 23 Mad 593 referred to 46
Sreenath Gooho v Yusoof Khan I L R 7 Calc 556 dissented from 21
Sri Nath Das v Angad Singh 7 A L J 459 referred to 164
Sri Nath Das v Probodh Chander Das 11 C L J 580 referred to 40
Stree Rajah Yanumula Venkayamah v Stree Rajah Yanumula Boochia Venkondora 13 Moo I A 333 referred to 85
Subba Rau v Devu Shetti I L R 18 Mad 126 referred to 277 280
Sudarshan Das Shastri v Ram Prasad I L R 33 All 97 followed 265
Sukho Bibi v Ram Sukh Das I L R 5 All 263 referred to 45
Sundar Singh v Doru Shankar I L R 20 All 78 followed 398
Sunkur Pershad v Goury Pershad I L R 5 Calc 321 referred to 138
Suraj Bali Prasad v Thomas I L R 28 All 48 referred to 503
Suraya Bhukta v Lakshminarasimma I L R 5 Mad 291 referred to 68?
Surji Ram Marwari v Barhamdeo Prasad 1 C L J 337 distinguished 601

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Tacoordeen Tewarry v Nawab Syed Ali Hoossein Khan L R 1 I A, 192 13 B L R 427 referred to 462
Talewar Singh v Bahori Singh I L R 26 All, 497, referred to 46
Tatia v Babaji I L R 22 Bom 176 referred to 276
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Uman Kunwari v Jarbandhan I L R 30 All 479 distinguished 284
Unnoda Persaud Mookerjee v Kristo Coomar Moitro 15 B L R, 60 note referred to 501

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Virbbadrapa v Bhimaji I L R 28 Bom 432 referred to 164
Vithu Dhondi v Balaji I L R 32 Bom 325, referred to 566

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Wali ullah v Durga Prasad I L R 28 All 340 followed 185
Warter v Warter L R 15 P D 152 59 L J P and M, 87 followed 201
Watson & Co v Ram Chand Dutt I L R 18 Calc 10 referred to 154
Wilaiti Begam v Fazl Husain Khan 9 A L J 148 distinguished 337

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Zamindar of Karvetnagar v Trustee of Tirumalai I L R, 32 Mad, 429 dissented from 84

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ACKNOWLEDGEMENT *See* Act No IX of 1908 section 19 106

——————*See* Act No XV of 1877 section 19 371

ACCUSED PERSON *See* Criminal Procedure Code sections 145 526 533

ACQUITTAL *See* Criminal Procedure Code section 42 115

ACTS—1859—XIV (LIMITATION ACT) SECTION I (12) *See* Bengal Regulation No XV of 1793 261

——1860—XLV (INDIAN PENAL CODE) SECTIONS 182 211—*Sanction to prosecute—Criminal Procedure Code section 195*] *H* made a report against several persons including one *S* at a police station charging them with rioting and voluntarily causing hurt The police made inquiry and sent up several persons for trial, but not *S* Some of these were convicted by the Magistrate but acquitted by the Sessions Judge Thereupon *S* made a complaint to the Magistrate charging *H* with having made a false report in respect of himself to the police. The Magistrate took cognizance of the complaint

Held that the Magistrate had no power to take cognizance of the complaint by reason of the absence of sanction

Emperor *v* Hardwar Lal 512

—————— SECTION 296—*Disturbing a religious assembly—Religious procession on a highway—Carrying of flags to a temple*] Where certain Lodhas who with the sanction of the public authorities had been carrying flags to a temple in procession through a public street were attacked by persons who objected to the procession *held* that such attack constituted a disturbance of the performance of a religious ceremony punishable under section 296 of the Indian Penal Code

Emperor *v* Masit 78

—————— SECTION 366—*Kidnapping—Taking out of custody*] Where two girls under the age of 16 years ran away from their houses and remained for nearly one or two days in the house of a woman who belonged to the caste of *Naiks* in Kumaun and no report was made to the padhan or the patwari *held* that the woman in whose house the girls stayed was properly convicted of an offence under section 366 of the Penal Code. *Queen v Gunder Singh* W R. Cr. R. 6 dissented from

Emperor *v* Jasauli 340

—————— SECTION 379—*Theft—Removal of goods from a person's custody—Larceny*] In order to constitute larceny there must be an intention to take entire dominion over the property i e the taker must intend to appropriate the property to his own use but there may be theft without an intention to deprive the owner of the property permanently

Hence where a person snatched away some books from a boy as he came out of school and told him that they would be returned when he came to his house, *held* that the offence of theft had been committed. *R v Dickinson* R. and R. 420 *Prosonno Kumar Patra v Udoy Sant* I. L. R. 22 Calc., 669 and *Queen-Empress v Agha Muhammad Yusuf* I. L. R. 18 All., 88 referred to.

Emperor *v* Naushe Ali Khan 89

—————— SECTION 41 *See* Act No. I of 1872, sections 14, 15 93

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ACTS—1860—XLV (INDIAN PENAL CODE) SECTION 426, *See* Act No VIII of 1876 sections 7 and 70 210

——— SECTION 498—*Enticing away a married woman—Marriage—Hindu law—Whether marriage legal between a Bania and the illegitimate daughter of a Brahman and a Banya woman*] *Held* that there was no reason why a marriage between a Banya and the illegitimate daughter of a Brahman father and Banya mother should not be valid according to Hindu law especially when the marriage was recognized by the caste to which the husband belonged. *Padam Kumari* v *Suraj Kumari* I L R 28 All 458 and *In the matter of Ram Kumari* I L R 16 Calc 264 referred to

Emperor *v* Madan Gopal 589

———1867—III (PUBLIC GAMBLING ACT) SECTION 5—*Jurisdiction—Power to issue search warrant— Officer invested with the full powers of a Magistrate —Sub-divisional officer issuing warrant for search outside his sub-division*] *Held* that a search warrant i sued under section 5 of the Public Gambling Act 1867 by a first class magis trate was not invalid by reason of the fact that the house to be searched was situated outside the limits of the tahsils in respect of which such magistrate had been appointed sub-divisional officer

Emperor *v* Abbu Singh 597

——— SECTION 12— *Mere game of skill —Game of chance*] *Held* that a game which is in fact only to a very slight extent a game of skill and almost entirely a game of chance is not a game which is excluded by reason of section 12 of the Gambling Act 1867 from the previous provisions of that Act *Hari Singh* v *King Emperor* 6 O L J 708 distinguished

Emperor *v* Ahmad Khan 96

———1869—I (OUDH ESTATES ACT) SECTION 6 *See* Mortgage 620

———1869—IV (INDIAN DIVORCE ACT) SECTION 57—*Marriage—Remar riage of petitioner in divorce proceedings within six months of the decree becoming absolute*] Where the successful petitioner in a suit for dissolution of marriage entered into a second marriage within six months of the decree for dissolution of marriage becoming absolute it was *held* that the second marriage was void *Warter* v *Warter* L R 15 P D 152 59 L J P and M 87 followed.

Jackson *v* Jackson 203

———1870—VII (COURT FEES ACT) SCHEDULE II ARTICLE 17 (vi)—*Court fee payable on plaint—Suit by plaintiff in joint po session to have share partitioned—Fixed fee ten rupees*] In a suit for partition where the plaintiff alleges that he is in possession and merely claims partition of the property and separate posse sion of his share a court fee stamp of 10 rupees is sufficient *Reo i* v *Lachhman* Weekly Notes 1900 p 90 *Wali ullah* v *Durga Prasad* I L R 28 All 340 and *Bidhata Rai* v *Ram Chari ar Rai* 12 C W N 37 followed.

Tara Chand Mukerji *v* Afzal Beg 184

———1872—I (INDIAN EVIDENCE ACT) SECTIONS 11 AND 32—*Evidence —Admissibility—Statements of deceased persons*] *Held* that if the terms of a deposition made by a person since deceased do not fall within the provisions of section 32 of the Indian Evidence Act 1872, the provisions of section 11 of the Act will not avail to make such deposition evidence.

Bela Rani *v* Mahabir Singh 341

——— SECTIONS 14 15—*Act No XLV of 1860 (Indian Penal Code) section 415—Cheating—Evidence to show instances of cheating other than those charged inadmissible.*]

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A person employed as a clerk in charge of the renewal of licences for hand-carts received Rs 2 for each such renewal whereas he ought to have taken Rs 1 14 0 He was charged with cheating and evidence was produced showing that he had taken 2 annas in excess from persons other than the e named in the charge *Held* that such evidence was inadmissible either under section 14 or under section 15 of the Evidence Act *Emperor* v *Debendra Prasad* I L R 36 Calc 573 distinguished *Empress* v *M J Vyapoory Moodeliar* I L R 6 Calc 655 referred to

Emperor *v* Abbul Wahid Khan 93

ACTS—1872—I (INDIAN EVIDENCE ACT) SECTION 44—*Compromise decree—Suit to set aside decree on the ground that the agreement was caused by undue influence—Jurisdiction*] A decree obtained by consent or on a compromise can be attacked in a separate suit not only upon the ground of fraud but upon any ground which would be a sufficient reason for invalidating the agreement upon which the decree was based *The Huddersfield Banking Company Limited* v *Henry Lister and Son Limited* L R ? Ch 273 followed *Musammat Gulab Kuar* v *Bad hah Bahadur* 13 C W N 1197 and *Sarbesh Chandra Basu* v *Hari Dayal Singh* 14 C W N 451 referred to

Shami Nath Chaudhri *v* Ramjas 143

——— SECTION 69—*Proof of document—Document required by law to be attested—Death of attesting witness—Hindu law—Joint Hindu family—Parties*] On execution of a deed of mortgage the names of two out of the four attesting witnesses were written by the scribe who also signed the document himself *Held* that it being necessary to prove the deed of mortgage after the death of all the attesting witnesses and the scribe it was sufficient to prove the handwriting of the scribe *Radha Kishen* v *Fateh Ali Ram* I L R 20 All 532 referred to

Where all the adult members of a joint Hindu family appear on the record as plaintiffs or defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit *Hori Lal* v *Munman Kunwar* L L R 34 All 549 and *Nathu Lal* v *Lala* I L R 34 All 672 referred to

Krishna Jiva Tewari *v* Bishnath Kalwar 615

——— SECTION 91—*Suit on promissory note—Note inadmissible in evidence—Plaintiff entitled to fall back on original cause of action*] If a creditor has a cause of action for the recovery of money for which his debtor has executed a promissory note separate from and independent of the note he can recover upon such cause in case the note for any reason cannot be put in evidence Nor is the creditor necessarily debarred from suing on the original cause of action by the fact that it arose out of the same transaction in the course of which the promissory note was executed. *Parso am Narayan* v *Taley Singh* I L R ?6 All 178 overruled *Sheikh Akbar* v *Sheikh Khan* I L R 8 Calc 256 *Krishnaji* v *Rajmal* I L R 24 Bom 360 *Virbhadrapa* v *Bhimaji* I L R 28 Bom 43? *Banarsi Prasad* v *Fazl Ahmad* I L R 28 All 298 and *Sri Nath Das* v *Angad Singh* 7 A L J 459 referred to.

Ram Sarup *v* Jasodha Kunwar 1?8

——— SECTION 108—*Evidence—Presumption of death—Burden of proof*] *Held* that the presumption which it is permissible to make under section 108 of the Indian Evidence Act 1872 does not go further than the mere fact of death If the period which has elapsed since the time that the person whose death is in question was last heard of is more than seven years, there is no presumption that such person died during the first period of seven years and not at any subsequent period.

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Dharup Nath v *Gotind Saran* I L R 8 All 614 discussed. *In re Phene s Trusts* L R. 5 Ch A 139 *Narayan Bhagwant* v *Shrinivas* 8 Bom L R 226 *Fani Bhushan Banerji* v *Surjya Kanta Ray Chowdhry* I L R 35 Calc 25, and *Srinath* v *Probodh Chunder Das* 11 C L J 580 referred to

Muhammad Sharif *v* Bande Ali 35

ACTS—1872—I (INDIAN EVIDENCE ACT) SECTION 114 —*Burden of proof —Suit on mortgage bond—Production by plaintiff of copy of bond on the ground of lo s of the original—Defendant s admission of execution and production of original with payment of debt endorsed by agent of mortgagee—Rebuttal of defendants evidence by plaintiff with fal e story*] In a suit for money due on a mortgage bond the plaintiff produced only a copy of the document alleging in his plaint that it had been lost The defendant admitted its execution but alleged that the debt had been discharged and in support of his allegation he produced the original document containing the endorsement of the mortgagee through her agent of payment of the debt The Subordinate Judge relying on sect on 114 of the Evidence Act put the *onus* on the plaintiff who to account for the pos e sion of the bond by the defendant set up a case supported by witnesses which both courts below held to be false The Subordinate Judge dismiss d the suit The Judges of the Judicial Commissioner s court disbelieved the evidence on both sides set aside the presumption under section 114 of the Evidence Act and endeavoured to make out a case for the plaintiff based on a theory of their own

Held (reversing that decision) that the first court was right in holding that the production by the defendant of the bond with the endorsement of payment cast on the plaintiff the burden of proving that the debt was still outstanding and that the appellate court should not have disregarded the presumption under section 114 in favour of a possibility based on surmise Suspicion though a ground for scrutiny could not be made the foundation of a decision

Muhammad Mehdi Hasan Khan *v* Mandir Das 511

——— SECTION 114 *See* Act No III of 1877 sections 32 60 75 653

——187?—IX (INDIAN CONTRACT ACT), SECTIONS 23 27—*Agreement between several firms to fix rates for ginning and baling cotton and to sha e p ofits—Agreement neither in restraint of trade nor against public policy*] *Held* that an agreement whereby certain firms fixed the rates to be charged for ginning and baling cotton and further as to the manner in which the profits should be shared by the parties thereto was an agreement neither in restraint of trade nor opposed to public policy *Haribhai Manek Lal* v *Sharafali I abji* I L R 22 Bom 861 and *Frazer & Co* v *The Bombay Ice Manufacturing Co*, I L R 29 Bom 107 followed

Kuber Nath *v* Mahali Ram 587

——— SECTION 39—*Contract—Mortgage—Part of consideration unpaid—Effect of such non-payment*] Where on execution and registration of a mortgage an interest in the mortgaged property has vested in the mortgagee the fact that part of the mortgage money as specified in the deed of mortgage has not been paid neither renders the mortgage invalid nor entitles the mortgagor to rescind it at his option *Gokal Chand* v *Rahman* Punj Rec 1907 274 dis ented from *Tatia* v *Babaji* I. L R 22 Bom 176 *Subba Rau* v *Devi Shetti* I L R 18 Mad 12, *Bajrangi Sahai* v *Udit Na ain Singh* 10 C W N 932 and *Baij Nath Singh* v *Paltu* Weekly Notes 1908 p 38 referred to

Rashik Lal *v* Ram Narain 273

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ACTS—1872—IX (INDIAN CONTRACT ACT) SECTION 212 See Civil Procedure Code (1908) section 20 (c) 49

———— SECTION 43 See Land holder and tenant 604

———— SECTION 235—*Principal and agent—Untrue representation by agent as to extent of his authority—Liability of agent*] *Held* that section 235 of the Indian Contract Act 1872 applies as much to the case of a person who untruly represents the extent of the authority given to him by another as to that of a person who represents himself to be the agent of another when in fact he has no authority from him whatever *Collen* v *Wright* 27 L J Q B 215 7 E & B 301 referred to
Ganpat Prasad *v* Sarju 168

———1873—VIII (NORTHERN INDIA CANAL AND DRAINAGE ACT) SECTIONS 7 70—*Act No XLV of* 1860 *(Indian Penal Code) section* 426—*Cutting walls of canal—Mischief—Penal provisions of the Canal Act not exclusive of the Indian Penal Code*] *Held* (1) that section 70 of the Northern India Canal and Drainage Act 1873 does not bar the prosecution of an accused person under any other law for any offence punishable under the Canal Act (2) that it is an act of wilful mischief punishable under the Indian Penal Code for any person to make a breach in the wall of a canal
Emperor *v* Bansi 210

———1877—I (SPECIFIC RELIEF ACT) SECTION 30—*Specific performance—Award—Suit to recover money payable under an award—Act No IX of* 1908 *(Indian Limitation Act) schedule I articles* 113 116 120—*Limitation*] By the terms of an award it was provided *inter alia* that the defendants should pay to the plaintiff the sum of Rs 3 0 on or before the 27th of June 1904 and in default of such paym nt the plaintiff could recover from the defendants Rs 350 with interest at 12 per cent per annum.

Held that a suit to recover on default of payment by the stipulated date the sum abovenamed with interest was not a suit for specific performance of a contract and as such governed by article 113 of the first schedule to the Indian Limitation Act 1908 but was governed by either article 116 or article 120

Sukho Bibi v *Ram Sukh Das* I L R 5 All 2?3 *Raghubar Dial* v *Madan Mohan Lal* I L R 16 All 3 *Sheo Narain* v *Beni Madho* I L R 23 All 285 *Sornavalli Ammal* v *Muthayya Sastrigal* I L R 23 Mad 593 *Talewar Singh* v *Bahori Singh* I L R 26 All 497 and *Bajahari Saha Banilya* v *Behary Lal Basal* I L R 33 Calc 831
Kuldip Dube *v* Mahaul Dube 43

———— SECTIONS 39 and 42 See Civil Procedure Code (1908) order XLI rule 22 140

———1877—III (INDIAN REGISTRATION ACT) SECTION 32—*Registration—Presentation*] Where the executants of a document which it is desired to register are pres nt acquiescing in the handing over of the document to the Registrar for regis ration the fact that the physical act of handing the document to the Registrar is performed by a person who is not authorized to pres nt the document for registration will not render the presentat on invalid.
Nath Mal *v* Abdul Wahid Khan 35?

———— SECTIONS 32, 33—*Registration—Evidence—Presumption of validity of re istra ion—Presumption rebutted by evidence showing document to have been p esented by an unathorized person*] Although, when the validity of the reg s ration of a document is in quest on after the lapse of a considerable period of time it is to be presumed that the reg stra on was carried out according to law yet wh n there exis s evidence which discloses a

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fatal defect in procedure as for instance, that the person who presented the document for registration was not legally authorized to do so, the registration must be held to be invalid Such a defect as presentation by an unauthorized person cannot be cured by subsequent admission of execution on the part of the executants *Mohammed Ewaz* v *Brij Lall* L R 4 I A 166 and *Mujib un-nissa* v *Abdur Rahim* I L R 23 All 233 referred to *Bilaiti Begam* v *Fazal Husain Khan* 9 A L J 149 and *Ram Chandra Das* v *Farzand Ali Khan* I L R, 34 All 253 distinguished.

Jambu Prasad *v* Muhammad Aftab Ali Khan 331

ACTS—1877—III (INDIAN REGISTRATION ACT) SECTIONS 32 60 75—*Registration—Presentation—Endorsement of registering officer—Presumption—Evidence—Act No I of 1872 (Indian Evidence Act) section 114*] A document was presented to a Sub Registrar for registration by a *karinda* of the person in whose favour it was executed It was received for registration. Simultaneously with the presentation an application was made to summon the executants They failed to appear and the Sub Registrar considering that execution was not admitted refused to register the document The matter came up before the District Registrar by means of an application under section 73 of the Registration Act and the presence of the executants having been secured the District Registrar ordered that the document should be registered. The document was apparently then sent by the Registrar to the Sub-Registrar by whom it was registered

Held that in the absence of evidence to the contrary it must be presumed that the *karinda* who presented the document was duly authorized in that behalf and further that even if the Registrar had in fact sent the document direct to the Sub Registrar instead of returning it to the person who had presented it for registration this fact alone was not sufficient to invalidate the registration *Mohammed Ewaz* v *Brij Lall* L R 4 I A 167 referred to *Mujib un nissa* v *Abdur Rahim* I L R 23 All 33 and *Ishri Prasad* v *Baij Nath* I L R. 28 All 707 distinguished

Ram Chandra Das *v* Farzand Ali Khan 253

———— SECTION 50 — *Registration—Mortgage—Priority between registered and unregistered deeds*] Property which was the subject of two unregistered mortgages of different dates was sold in execution of a decree on the later of the two mortgages and purchased by the decree holder who afterwards sold it by an unregistered deed to Bal Kishan who in turn sold it by a registered deed without making any mention of the prior unregistered mortgage *Held* that after such sale no suit would lie on the prior unregistered mortgage *Sobhagchand Gulabchand* v *Bhaichand* I L R 6 Bom. 193 *Baldeo Prasad* v *Baldeo* Weekly Notes 1901 p 112 and *Ram Lal* v *Thakur Bachcha Singh* 10 A L J 114 referred to

Ishri Prasad *v* Gopi Nath 631

————1877—XV—(INDIAN LIMITATION ACT) SECTION 19—*Mortgage—Redemption—Limitation—Acknowledgement*] *Held* that an acknowledgement of the title of the mortgagor made by only one of two mortgagees would not avail to save the mortgagor s right to redeem being barred by limitation where the mortgage was a joint mortgage and incapable of being redeemed piecemeal *Dharma* v *Balmakund* I L R 18 All 458 followed.

Jwala Prasad *v* Achchey Lal 371

———— SECTION 2 SCHEDULE II ARTICLE 85 *See* Act No IX of 1908 section 29 419

———— SCHEDULE II ARTICLES 44 and 144 *See* Muhammadan law 213

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ACTS—1877—XV (INDIAN LIMITATION ACT) SCHEDULE II ARTICLES 110 116—*Suit to recover rent on a registered lease—Limitation*] *Held* that a suit for the recovery of rent based upon a registered lease is governed as to limitation not by article 116 but by article 110 of the Indian Limitation Act 1877 *Ram Narain* v *Kamta Singh* I. L. R. 26 All. 138 followed

Jaggi Lal v Sri Ram 464

——— SCHEDULE II ARTICLE 116

See Contract 429

——— SCHEDULE II ARTICLE 178—*Act No IX of* 1908 (*Indian Limitation Act*) *section* 15—*Execution of decree—Limitation—Execution stayed by injunction*] In execution of a decree certain property was attached by the decree holder by means of an application made on the 8th of July 1904 Objection was taken to the attachment which was disallowed on the 10th of March 1908 This was followed up on the 5th of April, 1905 by a declaratory suit against the decree holder An injunction was also granted on the 6th of April 1905 whereby the sale of the property in suit was stayed The suit terminated on the 26th of June 1907 but the injunction lasted until January 1909 The next application for execution was made on the 14th of April 1910

Held that this last application was within time whether the Limitation Act of 1877 or that of 1908 applied. It was not relevant that the decree holder might possibly have obtained execution of the decree against other property of his judgement debtor *Behari Lal Misir* v *Jagannath Prasad* I. L. R. 28 All 651 followed

Ghulam Nasir ud-din v Hardeo Prasad 436

—1878—I (OPIUM ACT) SECTIONS 5 9—*Master and servant—Liability of master for act of servant*] Where the servant of a licensed vendor of opium in the course of his employment as such servant sold opium to a person under the age of fourteen years it was *held* that the licensed vendor also was liable under section 9 of the Opium Act even though he might not have been aware of the sale *Queen Empress* v *Tyab Ali* I. L. R. 24 Bom 423 followed

Emperor v Babu Lal 319

—1878—XVII (NORTHERN INDIA FERRIES ACT) SECTION 22—*Ferry—Illegal toll taken by servants of lessee—Lessee himself not responsible*] *Held* that the lessees of a ferry could not be held responsible under section 29 of the Northern India Ferries Act 1878 for the taking of unauthorized tolls by their servants when they were not present and took no part in the extortion *Queen-Empress* v *Tyab Ali* I. L. R. 24 Bom. 423 distinguished.

Emperor v Behari Lal 146

—1882—II (INDIAN TRUSTS ACT) SECTION 88—*Trust—Trustee entering into dealings in which his own interest may come into conflict with his duty as trustee—Purchase of mortgage deed comprising property belonging at the time of purchase to the trust*] A member of a body of trustees purchased for a very low price at an auction sale in execution of a simple money decree held by the trustees as such a mortgage bond comprising, amongst other property a village of which two-thirds had been previously purchased by the author of the trust and formed part of the trust property Neither the purchaser nor the trustees had obtained the leave of the court to bid. The auction purchaser claimed the purchase for himself and sought to enforce the mortgage by suit.

Held that the auction purchaser could not be allowed to do this but must on the contrary, be taken to have made the purchase for the benefit of the trust All that he was entitled to was to be repaid

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the actual sum which he himself paid for the mortgage deed at the auction sale.

Gopi Narain v Kunj Behari Lal 306

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 41—*Ostensible owner—Owners of property minors at date of transfer—Act (Local) No II of 1901 section 201*] The owner of certain zamindari property died leaving him surviving a widow and two minor sons During the minority of the sons their mother not only got herself recorded in respect of one third of the property left by the husband (her proper share being one-eighth and the balance being her sons) but she mortgaged it to one *N* *N* sold his rights to *B* who brought a suit for sale on his mortgage and having brought the property to sale purchased it himself He subsequently transferred it to *M* *M* brought a suit for profits against the sons and got an *ex parte* decree *Held* on suit by the sons for declaration of title to their share in the property excluding the one eighth belonging to their mother or in the alternative for possession (1) that the suit was not barred by the provision of section 41 of the Transfer of Property Act 1882 and (2) that the proviso to section 201 of the Agra Tenancy Act 1901 protected the present suit *Dalibai* v *Gopibai* I L R., 26 Bom 43 and *Dambar Singh* v *Jawitri Kunwar*, I L R., 29 All., 292 referred to

Abdullah Khan v Musammat Bundi 22

——————— SECTIONS 58 100 *See* Mortgage 446

——————— SECTIONS 88, 89—*Joint decree for sale—Application for order absolute made by some of the decree holders after the coming into force of the Civil Procedure Code 1908—Civil Procedure Code (1908) order XXXIV—Act No X of 1897 (General Clauses Act) section 6*] A decree for sale under the provisions of section 88 of the Transfer of Property Act, 1882 was passed jointly in favour of *B* and *K*. *B* died before any order absolute for sale was passed. On 30th April, 1909 the sons of *B* made an application for an order absolute for sale under section 89 of the Transfer of Property Act *K* was not made a party to it.

Held that the application would lie inasmuch as the sons of *B* being joint decree holders with *K* were entitled to apply for an order for sale (whether or not such order be in fact a final decree) their right to do so being inherent in the decree under section 88 of the Transfer of Property Act The subsequent repeal of the section could not affect any right acquired or liability incurred thereunder

Ganga Singh v Banwari Lal 72

——————— SECTION 90—*Mortgage—Sub-mortgage—Purchaser from mortgagor—Mortgage money forming part of consideration for sale—Personal liability of purchaser—Sale of mortgagee rights*] In this case it was held (affirming the decisions of the Courts in India in *Jamna Das* v *Ram Autar Pande* I L R. 31 All. 352) that the purchaser of the mortgaged property was not a person from whom the balance of the mortgage debt was legally recoverable within the meaning of section 90 of the Transfer of Property Act IV of 1882

Jamna Das v Ram Autar Pande 63

——————— SECTION 101—*Purchase—Satisfaction of mortgage on property purchased—Intention of purchaser to keep mortgage alive for his benefit—Presumption*] In considering the question whether an incumbrance should be deemed to continue to subsist on the ground that the continuance of it was for the benefit of the person who has acquired the property the point of

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time to be regarded is the date of the acquisition of the property If an intention to keep alive a charge on property is inconsistent with the real intention of the parties to the deed by which the purchaser of the property takes an assignment of it the charge cannot be treated as still subsisting simply because the purchaser afterwards finds that it would have been better for him to have kept the charge alive *Liquidation Estates Purchase Co* v *Willoughby* [1898] A C 321 followed *Bindeshri Singh* v *Pandit Balraj Sahai* 10 Oudh Cases 49 and *Mohesh Lal* v *Bawan Das* I L R 9 Calc, 961 referred to

Jugal Kishore *v* Ram Narain 268

ACTS—1887—IX (PROVINCIAL SMALL CAUSE COURTS ACT) SECTION 25—*Jurisdiction of High Court—Revision—Refusal of leave to amend plaint*] *Held* that the refusal on the part of a Court of Small Causes of permission to amend a technical defect in the plaint amounted to an irregularity such as would justify the interference of the High Court in revision under section 25 of the Provincial Small Cause Courts Act 1887

Heydorn and Company *v* Muhammad Shafi 348

——1887—XII (BENGAL NORTH WESTERN PROVINCES AND ASSAM CIVIL COURTS ACT) SECTIONS 8 20—*Act No III of* 1907 *(Provincial Insolvency Act) sections* 43 46 3—*Appeal—Jurisdiction—Effect of order of District Judge assigning work to Additional Judge*] Where an additional District Judge sentenced an applicant for insolvency under section 43 of the Provincial Insolvency Act 1907 acting in the matter under an order of the District Judge assigning the particular class of work to him under section 8 of the Bengal North Western Provinces and Assam Civil Courts Act 1887 it was held that an appeal from the Additional Judge s order lay to the High Court and not to the District Judge.

Makhan Lal *v* Sri Lal 383

——SECTIONS 8 (2) ,21 (3)—*Assignment to Additional Judge of cases coming from a particular district—Jurisdiction*] A District Judge has power not merely to make over appeals to an Additional Judge for hearing but to direct that all appeals and other cases coming from a particular area within the judicial division shall be filed in his Court

Mutsaddi Lal *v* Mule Mal 205

——1889—VII (SUCCESSION CERTIFICATE ACT) SECTIONS 19 26—*Munsif invested with functions of District Court—Appeal—Jurisdiction*] *Held* that an appeal from an order of a Munsif invested under section 26 of the Succession Certificate Act 1889 with the functions of a District Court lies to the District Judge and cannot be trans ferred for disposal to any other Court such as the Subordinate Judge or Judge of the Small Cause Court not empowered under section 56

Huran Bibi *v* Hingan Bibi 148

——1890—IX (INDIAN RAILWAYS ACT) SECTIONS 75 80—*Suit for compensation for loss of through-booked goods—Short delivery—Uninsured goods*] *Held* that where goods are booked for conveyance over more than one railway system the owner can only claim compensa tion for loss against a railway company other than the company with which they were booked if it is shown that the loss occurred on the system of the company sued.

Held also that if goods, the insurance of which is obligatory are packed uninsured with other goods the insurance of which is not obligatory no compensation is obtainable for the loss of either class of goods *Pandlik Udaji Jadhav* v *S M Railway Company* I. L R 11 Bom. 827 followed.

Great Indian Peninsula Railway *v* Sham Manohar 421

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ACTS—1890—IX (INDIAN RAILWAYS ACT) SECTION 75—*Goods referred to in ection 75 consigned on a risk note —Railway Company not liable for loss*] Where a person chooses to send goods referred to in section 75 of the Indian Railways Act on a 'risk note form instead of declaring them and paying the extra percentage demandable under the terms of the section he cannot hold the Railway Company by which such goods are sent responsible for the loss thereof

Narain Das *v* The East Indian Railway Company 656

——— SECTION 125—*Cattle left in charge of keepers allowed to stray on a railway lin —Liability of owner*] The owner of cattle which have been allowed to stray upon a railway in consequence of the negligence of the person actually in charge of them on the owner s behalf is not liable to punishment under section 125 (1) of the Indian Railways Act 1890 *Queen-Empress* v *Andi* I L R 18 Mad 228, followed

Emperor *v* Gur Prasad Gir 1

———1897—X (GENERAL CLAUSES ACT) SECTION 6 *See* Act No IV of 1882 sections 88 89 72

——— SECTION 10 *See* Act No IX of 1908 section 31 375

———1899—II (INDIAN STAMP ACT) SECTION 65—*Receipt—Money remitted by postal money order and receipt signed on post office form—Further receipt not exigible from payee*] Where money is remitted by postal money order and the payee has signed the receipt in duplicate on the post office form he cannot legally be compelled to give a further receipt to the payer and his refusal to do so will not render him liable under section 65 of the Indian Stamp Act 1899

Emperor *v* Balmakund 192

———1907—III (PROVINCIAL INSOLVENCY ACT) SECTION 16—*Secured creditor—Landholder and tenant—Suit for arrears of rent—Declaration of insolvency in force at date of suit*] A landholder is not as regards an agricultural tenan a secured creditor within the mean ing of section 16(5) of the Provincial Insolvency Act 1907 Although he possibly may be in a position to distrain even whilst a declaration of insolvency is in force he cannot without the leave of the court sue for arrears of rent

Raghubir Singh *v* Ram Chandar 121

——— SECTIONS 16 AND 31—*Civil Procedure Code* (1908) *order XXXIV rule 6—Application for decree over against two judgement-debtors one of whom had been declared insolvent*] Where one of two mortgagors against whom a decree under order XXXIV rule 6, of the Code of Civil Procedure was otherwise obtainable had been declared an insolvent under the provisions of the Provincial Insolvency Act 1907 but the other had not *held* that the decree holders could not be granted a decree over as against the insolvent, but could only prove their debt in the insolvency proceedings *Barter* v *Dubeux and Company*, L R 7 Q B D 413 referred to

Mamraj *v* Brij Lal Chakravarti 106

——— SECTIONS 16 AND 34—*Execution of decree against insolvent during pendency of insolvency proceedings—Right of decree holder in respect of property attached and sold and money attached before adjudication*] Whilst proceedings in insolvency under the Provincial Insolvency Act 1907 were pending certain immovable property of the insolvent was attached and sold in execution of a decree against him and the proceeds deposited in court for the benefit of the decree-holder The decree-holder also

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attached certain moneys which had been paid into court to the credit of the insolvent but up to the date of the order of adjudication had taken no further steps to possess himself thereof *Held* that the decree holder was entitled as against the receiver to the benefit of the proceeds of execution of his own decree but not to the money of the insolvent which he had attached *Peacock* v *Madan Gopal*, I L R 29 Calc 428 followed

Sri Chand v Murari Lal 628

ACTS—1907—III (PROVINCIAL INSOLVENCY ACT), SECTIONS 24 AND 26—*Insolvency—Application by a creditor to have his name entered in the schedule of creditor—Right of the scheduled creditors to make objections—Revision*] Creditors whose names are already in the schedule prepared under section 24 of the Provincial Insolvency Act 1907 are entitled to be heard before the debt of a creditor who comes in at the last minute under section 24 (3) of the Act is entered in the schedule

Allahabad Bank Limited v Murlidhar 442

———— SECTIONS 43 46 3, *See* Act No XII of 1887 sections 8 20 383

———— SECTION 45 (4)—*Appeal—Limitation—Application of general provisions of the law of limitation—Act No IX of 1908 (Indian Limitation Act) sections 12 and 29*] The Provincial Insolvency Act is a special law within the meaning of section 29 of the Indian Limitation Act but, inasmuch as it is not in itself a complete code there is nothing to prevent the application thereto of the general provisions of the Indian Limitation Act Such general provisions do not affect or alter the period prescribed by a special law but only the manner in which that period is to be computed *Jugal Kishore* v *Gur Narain* I L R 33 All 738 overruled *Beni Prasad Kuari* v *Dharaka Rai* I L R 23 All 277 *Joti Sarup* v *Ram Chandar Singh* Weekly Notes 1902 p 34 and *Veeramma* v *Abbiah* I L R 18 Mad 99 followed *Poulson* v *Madhoosoodun Paul Chowdhry* 2 W R Act X Rulings 21 *Unnoda Persaud Mookerjee* v *Kristo Koomar Moitro* 15 B L R 60 note *Nagendro Nath Mullick* v *Mathura Mohun Parhi* I L R 18 Calc 368 *Girija Nath Roy Bahadur* v *Patani Bibee* I L R 17 Calc 263 *Bihari Lall Mookerjee* v *Mungolanath Mookerjee* I L R 5 Calc., 110 *Golap Chand Nowlukha* v *Krishto Chunder Das Biswas* I L R 5 C lc 314 *Nijabutoola* v *Wazir Ali* I L R 8 Calc 910 *Khetter Mohan Chuckerbutty* v *Dinabashy Shaha* I L R 10 Calc 265 *Guracharya* v *President of the Belgaun Town Municipalities* I L R 8 Bom 529 *Kullayappa* v *Lakshmipathi* I L R 12 Mad., 467 *Abdul Hakim* v *Latif un nissa Khatun* I L R 30 Calc 532 and *Suraj Bali Prasad* v *Thomas* I L R 28 All 48 referred to

Dropadi v Hira Lal 496

————1908—IX (INDIAN LIMITATION ACT) SECTION 12—*Time requisite for obtaining copy—Application for copy made on date the court closed for annual vacation—Notice posted during the vacation—Copy received after vacation*] Where an application for copies of a judgment and decree was made on the day when the court rose for its annual vacation it was *held* that the applicant was entitled to the benefit of the whole period of the vacation notwithstanding that the copying department was kept open for some days and a notice posted during the vacation that the applicant's copies were ready

Khub Chand v Harmukh Rai 41

———— SECTIONS 12 AND 29 *See* Act No. III of 1907 section 45 (4) 496

———— SECTION 15 *See* Act No XV of 1877 schedule II article 178 430

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ACTS—1908—IX (INDIAN LIMITATION ACT) SECTION 19—*Limitation—Acknowledgement by agent—Law to be applied to test the validity of an acknowledgement*] *Held* that the criterion to be applied to test the validity of an acknowledgement of liability put forward by a plaintiff as extending the period of limitation in his favour is the law in force at the time when the plaintiff's suit would otherwise have been time barred and not that in force at the time when the acknowledgement relied upon was made. *Mahesh Lal* v *Busunt Kumaree* I L R 6 Calc 340 *Rahmani Bibi* v *Hulasa Kuar* I L R 1 All 642 and *Hanuman Prasad* v *Raghunandan Singh*, I A. L I 355 referred to

Zaib un nissa Bibi *v* The Maharaja of Benares 102

———— SECTION 29—*Act No XV of* 1877 (*Indian Limitation Act*) *section* 2 *schedule II article* 35—*Suit for restitution of conjugal rights—Limitation*] The plaintiff in a suit for restitution of conjugal rights filed in 1910 alleged that his wife had been taken away by two of the defendants under a promise that she should return to him shortly but subsequently they denied all knowledge of her whereabouts In 1909 he alleged he was informed that she was living at a certain place with one of the defendants

Held that the plaintiff s suit was not barred by limitation *Binda* v *Kaunsilia* I L R 13 All 227 referred to

Aycsha *v* Faiyaz Husain 412

———— SECTION 341—*Mortgage—Suit for sale—Limitation—Act No X of* 1897 (*General Clauses Act*) *section* 10] The special period of limitation for suits for foreclosure or for sale by a mortgagee prescribed by section 31 of the Indian Limitation Act 1908 namely two years from the date of the passing of the Act expired on a Sunday *Held* that a suit for sale to which section 31 applied instituted upon the following Monday was within time *Shevdas Daulatram Marwadi* v *Narayan valad Asaji* 13 Bom, 1153 dissented from

Hira Singh *v* Musammat Amarti 875

———— SCHEDULE I ARTICLES 113 116 120 *See* Act No 1 of 1877 section 30 43

———— SCHEDULE I ARTICLES 116 120 131 132—*Suit to recover arrears of annuity charged on immoveable property—Claim for personal decree only—Limitation*] *Held* that article 132 of the first schedule to the Indian Limitation Act is applicable only to suits in which the plaintiff claims to recover money charged upon immoveable property to raise it out of that property and not to a claim in which merely personal decree is asked for *Ramdin* v *Kalka Prasad* I L R 7 All 502 followed

Held also that the words of article 131 to establish a periodically recurring right are altogether inapplicable to a suit to recover arrears of payments due under a registered contract *Dost Muhammad Khan* v *Sohan Singh* Punj Rec 1906 p 303 followed A suit of such a nature is governed by either article 116 or article 120 of the first schedule to the Indian Limitation Act

Lachmi Narain *v* Turab un nissa 246

———— SCHEDULE I ARTICLE 152—*Limitation—Appeal—Jurisdiction—Appeal presented to Judge at his private house after court hours*] A memorandum of appeal was presented to a District Judge at his private house after court hours on the last day of limitation *Held* that the Judge had jurisdiction to accept the memorandum of appeal so presented though he was

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not obliged to do so *Jai Kuar* v *Heera Lal* 7 N W P, H C Rep 5 overruled

Thakur Din Ram *v* Hari Das 482

ACTS 1908—XVI (INDIAN REGISTRATION ACT) SECTION 17 (2) (xi)—*Mortgage—Receipt for mortgage money—Registration*] A receipt for money due upon a mortgage was given in the following terms — The bond is returned No money remains due *Held* on suit for recovery of the mortgage debt that the receipt did not require to be registered and that the words no money remains due did not purport to extinguish the mortgage

Piari Lal *v* Makhan 528

——————SECTIONS 36 73 77—*Registration—Refusal of Sub Registrar to register—Appeal to Registrar—Refusal to register based on inability to procure attendance of executant's—Suit to compel registration*] A sale deed was presented for registration but the executants did not appear before the Sub Registrar who after four months from the date of execution, reported the fact to the Registrar and was directed by the latter not to register it Registration was accordingly refused An appeal against that order to the Registrar was dismissed It appeared that the summonses by the Sub Registrar to the executants had been returned unserved The vendees brought a suit for registration of the document *Held* that the suit was maintainable the refusal by the Sub Registrar to register not being based upon denial of execution *Luckhi Narain Khettry* v *Sat Cowrie Pyne* I. L. R, 16 Calc 189 distinguished

Khadim Husain *v* Bharat Singh 316

——————SECTIONS 73 74 77—*Registration—Refusal to register—Inquiry ordered but application dismissed on account of parties failing to attend—Suit to compel registration*] A Sub Registrar refused to register a document presented to him and on the application of one of the parties the Registrar directed an inquiry under section 74 of the Indian Registration Act 1908 On the date fixed for the inquiry however the parties failed to appear and the Registrar accordingly dismissed the application *Held* that this amounted to a refusal to register within meaning of section 77 of the Act and a suit to compel registration would lie *Sajibullah Sirkar* v *Haji Khosh Mohamed Sirkar* I L R 13 Calc 264 followed *Udit Upadhia* v *Imam Bandi Bibi* I L R 21 All 402 distinguished

Abdul Hakim Khan *v* Chandan 165

——(LOCAL) 1900—I (UNITED PROVINCES MUNICIPALTIES ACT) SECTION 187 *See* Act (Local) No I OF 1904 section 23 391

——(LOCAL)—1901—II (AGRA TENANCY ACT) SECTIONS 4 95 167 197 *See* Jurisdiction 358

——————SECTION 9—*Fixed rate tenancy—Entry of name of tenant in revenue records—Conclusive proof*]—The entry mentioned in section 9 of the Agra Tenancy Act 1901 is conclusive proof only as to the nature of the tenancy as between the zamindar and the tenant and does not apply to questions as to the title to the tenancy as between rival claimants thereto *Mulai Singh* v *Pajwant Singh* Weekly Notes 1906 p 58 overruled

Jai Nath Pathak *v* Kalka Upadhya 253

——————SECTION 22—*Succession—Special rule of succession exclusive of personal law of parties*] *Held* that the rule of succession which is laid down by section 22 of the Agra Tenancy Act 1901 is independent and exclusive of the personal law of the parties to whom the section applies

Consequently the grandsons of a deceased occupancy tenant as his male lineal descendants would be entitled to share in the tenancy jointly with the sons of the late tenant *Bhura v Shahab ud din* I L R 30 All 198 followed

Ali Bakhsh v Barkat ullah

———— SECTION 22— *Lineal descendant —Adopted son*] *Held* that an adopted son is a lineal descendant within the meaning of section 22 of the Agra Tenancy Act 1901

Lala v Nahar Singh

———— SECTIONS 166 201 —*Lessee continuing to be recorded as such after expiry of lease —Suit for profits —Presumption*] The lessee of a mortgagee of zamindari property was recorded as entitled to the profits of the share and remained so recorded even after the mortgage had been redeemed *Held* in a suit for profits that the lessee was entitled to recover so long as he was recorded *Durga Prasad v Hazari Singh* I L R 33 All 199 followed

Muhammad Ahmad Said Khan v Muhammad Masih ullah Khan 250

———— SECTION 194—*Lambardar—Suit by lambardar against co sharers for excess of profits due to other co sharers and himself—Lambardar not agent of co-sharers*] *Held* that a lambardar is not the agent of the co-sharers generally so as to be entitled to sue on their behalf to recover profits due to some of them from other co sharers holding sir and khudkasht lands in excess of their proper shares

Bishambar Nath v Bhullo 98

———— SECTION 201 *See* Act No IV of 1882 section 41

————(LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT) SECTIONS 56 233 (*i*) *See* Jurisdiction 353

————1904—I (GENERAL CLAUSES ACT) SECTION 23—*Act (Local) No I of 1900 United Provinces Municipalities Act) section 187—Municipality—Powers of Government to frame rules—Rules as to Municipal election—Previous publication Competent court* Certain draft rules relating to municipal elections were published in the local Gazette These draft rules were then considered by the Government in connection with such criticisms and objections as had been presented and finally a set of rules was published in the Gazette as having been made under section 187 of the United Provinces Municipalities Act 1900

Held that such rules were none the less validly passed because in some details they differed from the draft rules previously published

The rules so made provided that a municipal election might be questioned by means of a petition presented to a competent court

Held that the expression competent court so used meant a Civil Court of competent jurisdiction with reference to the valuation given by the petitioner in his petition

Gur Charan Das v Har Sarup 301

ADOPTION *See* Act (Local) No II of 1901 section 22 653

———— *See* Estoppel 593

———— *See* Suit for declaration of invalidity of adoption 8

ADVERSE POSSESSION *See* Mortgage 290 610

AGREEMENT in restraint of trade *See* Act No. IX of 1872, sections 23, 27 597

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AGRICULTURIST *See* Civil Procedure Code (1908) section 60 (1) *(c)* 25

ANNUITY *See* Act No IX of 1908 schedule I, articles 116 120 131 and 132 246

APPEAL *See* Act No XII of 1887 sections 8 20 383

——— *See* Act No VII of 1889 sections 19 26 148

——— *See* Act No III of 1907 section 46 (4) 496

——— *See* Act No IX of 1908, schedule I article 152 482

——— *See* Civil Procedure Code (1908) section 47 530

——— *See* Civil Procedure Code (1908) order XLI rule 33 32

——— *See* Criminal Procedure Code section 423 115

——— *See* Letters patent section 10 13

——— *See* Partition 493

——— *See* Review of judgement 282

ASSIGNMENT OF DECREE *See* Execution of decree 518

ATTACHMENT *See* Civil Procedure Code (1882) sections 278 279 280 281 365

——— *See* Civil Procedure Code (1908) order XXI rule 57 490

AWARD *See* Act No I of 1877 section 30 43

BENGAL REGULATIONS—1793—XV—*Mortgage—Redemption—Limitation—Act No XIV of* 1859 *(Limitation Act) section I* (12)—*Accounts*] A usufructuary mortgage was executed in the year 1859 in a place to which the provisions of Bengal Regulation XV of 1793 applied It provided that the mortgagees should enter into possession and collect the rent and pay the Government revenue and defray collection charges &c therefrom and retain the balance in lieu of interest There was to be no accounting on either side and the mortgagor was to be entitled to redeem on payment of the principal sum of Rs 252

Held on suit by the representative of the mortgagor to redeem brought within 60 years from the date of the mortgage that the suit was within time that the mortgage could not be considered as redeemed in the strict sense of the term from the moment when the profits received by the mortgagees became equal to the amount due to them for principal and interest and that the mortgagor was notwithstanding anything contained in the deed entitled to an account of the profits received by the mortgagees *Sudarshan Das Shastri* v *Ram Prasad* I L R 33 All 97 followed *Shafi un nissa* v *Fazl Ilahi* 7 A L J 787 and *Badri Prasad* v *Murlidhar* I L R 2 All 593 distinguished

Habib ullah v Abdul Hamid 261

BURDEN OF PROOF *See* Act No I of 1872 section 108 36

——— *See* Act No I of 1872 section 114 511

——— *See* Civil Procedure Code (1908) order XXI rule 23 612

——— *See* Hindu Law 126 135

——— *See* Parda nashin lady 455

CANAL *See* Act No VIII of 1873 sections 7 and 70 210

CATTLE Liability for straying of—— *See* Act No. IX of 1890 section 105 91

CAUSE OF ACTION *See* Act No I of 1872 section 91 158

——— *See* Civil Procedure Code (1882) section 43 172

——— *See* Contract 429

CESS, *See* Jurisdiction 253

CULTIVATING *See* Act No I of 1872 sections 14 15 53

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CIVIL AND REVENUE COURTS—*See* Jurisdiction 358

CIVIL PROCEDURE CODE (1882) SECTION 43—*Suit for injunction—Suit dismissed upon the ground that plaintiff had failed to prove his possession—Subsequent suit for possession*] *Held* that the dismissal of a suit for an injunction in respect of certain property upon the ground that the plaintiff has not proved his possession of the property in respect of which the injunction is sought is no bar to a subsequent suit for possession of the same property The principle of the decisions in *Darbo* v *Kesho Rai* I L R 2 All 356 *Sarsuti* v *Kunj Behari Lal* I L R 5 All 345 and *Mohan Lal* v *Bilaso* I L R 14 All 512 followed.

Bande Ali *v* Gokul Misir 172

——— SECTION 230—*Execution of decree—Limitation—Application for transfer of decree—Subsequent application for execution not in continuation of application for transfer*] *Held* that an application for execution can in no sense of the words be regarded as an application in continuation of an application for transfer of a decree from one court to another In order that an application may be a continuation of another application it is necessary that the two applications must be of the same nature and the application for transfer being an application of an entirely different nature from that for execution of a decree does not suspend the operation of section 230 of the Code of Civil Procedure 1882 *Sundar Singh* v *Doru Shankar* I L R 20 All 78 applied *Ram Sahai* v *Nanni* Weekly Notes 1886 p 137 dissented from.

Khetpal *v* Tikam Singh 397

——— SECTION 230—*Execution of decree—Decree upon compromise against lessees and on their failure to pay against the property of their surety—Execution against lessees after the lapse of twelve years*] A decree for rent was passed upon a compromise against certain lessees and their surety The decree provided that the amount of it should be realized in the first instance from the lessees by annual instalments and in the event of failure it would be recoverable by the sale of certain immoveable property which the surety had hypothecated. The decree was put into execution against the lessees as a simple money decree more than 12 years after the date of its passing *Held* that section 230 of the Code of Civil Procedure of 1882 applied and the decree could not be executed after the expiration of 12 years from the date thereof *Pahalwan Singh* v *Narain Das* I L R 22 All. 401 distinguished

Maharaja of Benares *v* Lalji Singh 636

——— SECTIONS 278 279 280 281—*Execution of decree—Attachment—Objection to attachment—Objection dismissed—Suit to recover possession—Jurisdiction*] *Held* on a construction of sections 278 279 280 and 281 of the Code of Civil Procedure 1882 that an objector may raise an objection to an attachment not only on the ground that he is in possession of the property attached but also on the ground that he has an interest in it and that when an executing court disallows the claim of an objector under section 281 the court has jurisdiction to do so notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection on some other ground.

Bhagwan Das *v* Raj Nath - - 365

——— SECTION 411—*Suit for dower in forma pauperis by wife against her husband and his mortgagees—Suit pending execution of decree for sale upon mortgage—Decree dismissing suit against mortgagees and making husband solely liable—Execution of decree to recover court fees due to Government—Effect of sale of mortgaged property*] The respondents obtained a decree for sale on

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their mortgage on the 17th of December 1895 Pending execution the wife of the mortgagor brought a suit *in forma pauperis* against her husband and his mortgagees for dower alleging that it was a charge on the mortgaged property in priority to the mortgage lien It was found that the dower debt was not charged on the property and on the 11th of May 1897 her suit was dismissed as against the mortgagees and a money decree passed against her husband alone and under section 411 of the Civil Procedure Code XIV of 1882 the amount of the court fees due to Government was made a first charge on the amount decreed Notwithstanding that the decree expressly dismissed the suit as against the mortgaged property the Collector in order to recover the court fees in the pauper suit brought it to sale on the 22nd of July 1899 in execution of the decree of the 11th of May 1897 and recovered just enough to satisfy them On the application of the respondents the Civil Court directed that the property should be again put up for sale in execution of the respondents decree of the 17th of December 1895 and on the the 0th of September 1902 it was purchased at that sale by the respondents who got formal possession. The purchaser under the decree of the 11th of May 1897 now represented by the appellants had however then obtained possession, and there was a contest for mutation of names which resulted in the revenue courts upholding the right of priority of the Government for the court fees and the possession of the appellants

Held in a suit in the civil court by the respondents to enforce their priority and for possession that they were entitled to succeed The decree of the 11th of May 1897, did not create nor purport to create any charge on the mortgaged property and the sale under it of the 22nd of July 1899 being a sale of the property of the defendant in the suit for dower to satisfy a debt of the plaintiff in that suit was without jurisdiction, and passed no title to the purchaser

Ragho Prasad *v* Mewa Lal 223

CIVIL PROCEDURE CODE (1882) SECTION 539—*Trust— Public charitable or religious purposes —Trust for benefit chiefly of a particular sect not necessarily not a public trust*] Where it was clearly established by evidence that certain property had been held for very many generations for the purpose of supporting and maintaining fakirs entertaining visitors and for the giving of alms and there was no evidence that the property was ever held for any other purpose, it was *held* that the court ought to presume the existence of a charitable or religious trust within the meaning of section 539 of the Code of Civil Procedure 1882 and the trust was none the less a trust for a public purpose if its main object was in fact the support of fakirs of a particular sect and the propagation of the tenets of that sect

Mahant Puran Atal *v* Darshan Das 468

———— SECTIONS 584 585—*Second appeal—Questions of law and fact—Construction of document—Wajib ul-arz—Land holder and tenant—Rights of zamindars in respect of house sites and groves.*] In a suit for a declaration of the proprietary title of the appellants to certain lands in a village, the first court dismissed the suit on the ground that the respondent was the zamindar and the appellants only tenants of the lands The Subordinate Judge found on the construction of the wajib-ul arz of the village and other documentary evidence that the appellants were the owners of the lands in suit. On second appeal to the High Court it was contended that the Court was bound under section 584 of the Civil Procedure Code, 1882 to accept the finding of the Subordinate Judge as conclusive the question being one of fact; but the High Court rejected that contention

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CIVIL AND REVENUE COURTS—See Jurisdiction 358

CIVIL PROCEDURE CODE (1882) SECTION 43—*Suit for injunction—Suit dismissed upon the ground that plaintiff had failed to prove his possession—Subsequent suit for possession*] *Held* that the dismissal of a suit for an injunction in respect of certain property upon the ground that the plaintiff has not proved his possession of the property in respect of which the injunction is sought is no bar to a subsequent suit for possession of the same property The principle of the decisions in *Darbo* v *Kesho Rai* I L R 2 All 356 *Sarsuti* v *Kunj Behari Lal* I L R 5 All 345 and *Mohan Lal* v *Bilaso* I L R 14 All 512 followed.

Bande Ali *v* Gokul Misir 171

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——————SECTION 230—*Execution of decree—Decree upon compromise against lessees and on their failure to pay against the property of their surety—Execution against lessees after the lapse of twelve years*] A decree for rent was passed upon a compromise against certain lessees and their surety The decree provided that the amount of it should be realized in the first instance from the lessees by annual instalments and in the event of failure it would be recoverable by the sale of certain immoveable property which the surety had hypothecated The decree was put into execution against the lessees as a simple money decree more than 12 years after the date of its passing *Held* that section 230 of the Code of Civil Procedure of 1882 applied and the decree could not be executed after the expiration of 12 years from the date thereof *Pahalwan Singh* v *Narain Das* I L R 22 All 401 distinguished

Maharaja of Benares *v* Lalji Singh 636

——————SECTIONS 278 279 280 281—*Execution of decree—Attachment—Objection to attachment—Objection dismissed—Suit to recover possession—Jurisdiction*] *Held* on a construction of sections 278 279 280 and 281 of the Code of Civil Procedure 1882 that an objector may raise an objection to an attachment not only on the ground that he is in possession of the property attached but also on the ground that he has an interest in it and that when an executing court disallows the claim of an objector under section 281 the court has jurisdiction to do so notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection on some other ground

Bhagwan Das *v* Raj Nath 365

——————SECTION 411—*Suit for dower in forma pauperis by wife against her husband and his mortgagee—Suit pending execution of decree for sale upon mortgage—Decree dismissing suit against mortgagees and making husband solely liable—Execution of decree to recover court fees due to Government—Effect of sale of mortgaged property*] The respondents obtained a decree for sale on

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their mortgage on the 17th of December 1895 Pending execution the wife of the mortgagor brought a suit *in formâ pauperis* against her husband and h s mortgagees for dower alleging that it was a charge on the mortgaged property in priority to the mortgage lien It was found that the dower debt was not charged on the property and on the 11th of May 1897 her suit was dismissed as against the mortgagees and a money decree passed against her husband alone and under section 411 of the Civil Procedure Code XIV of 1882 the amount of the court fees due to Government was made a first charge on the amount decreed Notwithstanding that the decree expressly dismissed the suit as against the mortgaged property the Collector in order to recover the court fees in the pauper suit brought it to sale on the 22nd of July 1899 in execution of the decree of the 11th of May 1897 and recovered just enough to satisfy them On the application of the respondents the Civil Court directed that the property should be again put up for sale in execution of the respondents decree of the 17th of December 1895 and on the the 20th of September 1902 it was purchased at that sale by the respondents who got formal possession The purchaser under the decree of the 11th of May 1897 now represented by the appellants had however, then obtained possession and there was a contest for mutation of names which resulted in the revenue courts upholding the right of priority of the Government for the court fees and the possession of the appellants

Held in a suit in the civil court by the respondents to enforce their priority and for possession that they were entitled to succeed The decree of the 11th of May 1897 did not create nor purport to create any charge on the mortgaged property and the sale under it of the 22nd of July 1899 being a sale of the property of the defendant in the suit for dower to satisfy a debt of the plaintiff in that suit was without jurisdiction and passed no title to the purchaser

Ragho Prasad *v* Mewa Lal 223

CIVIL PROCEDURE CODE (1882) SECTION 539—*Trust—' Public charitable or religious purposes —Trust for benefit chiefly of a particular sect not ne c sarily not a public trust*] Where it was clearly established by evidence that certain property had been held for very many generations for the purpose of supporting and maintaining fakirs entertaining visitors and for the giving of alms and there was no evidence that the property was ever held for any other purpose, it was *held* that the court ought to presume the existence of a charitable or religious trust within the meaning of section 539 of the Code of Civil Procedure 1882 and the trust was none the less a trust for a public purpose if its main object was in fact the support of fakirs of a particular sect and the propagation of the tenets of that sect

Mahant Puran Atal *v* Darshan Das 468

——— ———SECTIONS 584 585—*Second appeal—Questions of law and fact—Construction of document—Wajib ul-arz—Land holder and tenant—Rights of zamindars in respect of house sites and groves.*] In a suit for a declaration of the proprietary title of the appellants to certain lands in a village, the first court dismissed the suit on the ground that the respondent was the zamindar and the appellants only tenants of the lands The Subordinate Judge found on the construction of the wajib-ul arz of the village and other documentary evidence that the appellants were the owners of the lands in suit. On second appeal to the High Court it was contended that the Court was bound under section 584 of the Civil Procedure Code, 1882 to accept the finding of the Subordinate Judge as conclusive the question being one of fact; but the High Court rejected that contention

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Held (affirming that decision) that the Subordinate Judge s finding was arrived at by inferences drawn from a misconstruction of the wajib ul arz The right construction of documents was a question of law which the Court on second appeal was not precluded from considering under sections 584 and 585 of the Civil Procedure Code

On the true construction it was clear from the documentary evidence that the appellants were only tenants of the land and not proprietors

Fateh Chand v Kishan Kunwar 579

CIVIL PROCEDURE CODE (1908) SECTION 11—*Mortgage—Prior and subsequent mortgages—Suit for sale on second mortgage first mortgagees being made parties —Rights of first mortgagees not set up—Subsequent suit by first mortgagees barred—Res judicata*] Certain puisne mortgagees brought a suit for sale on their mortgage in which although they impleaded the prior mortgagees, they simply asked for the sale of the property mortgaged neither claiming to have their mortgage redeemed nor asking for sale subject to the prior mortgage The prior mortgagees on their part did not set up their rights under the prior mortgage *Held* that section 11 of the Code of Civil Procedure was a bar to the prior mortgagees afterwards suing for sale on their mortgage *Mohamed Ibrahim Hossain Khan* v *Ambika Pershad Singh* I. L. R 39 Calc 527 followed *Surji Ram Marwari* v *Barhamdeo Prasad* 1 C L J 337 distinguished

Gajadhar Teli v Bhagwanta 699

——————SECTION 20(c)—*Act No IX of 1872 (Indian Contract Act) section 212—Principal and agent—Suit for compensation for loss caused by negligence of agent Jurisdiction*] The plaintiffs who were grain dealers ordered the defendant who was a commission agent at Karachi to purchase some grain for them The latter did so and the plaintiffs sent him some money on account In accordance with the direction of the plaintiffs the railway receipt for the goods purchased was sent by value payable post By some mischance it did not arrive The defendant instructed the railway authorities not to deliver the goods till the balance due to him was paid The balance was paid by the plaintiffs to the defendant s agent at Delhi The Railway officials at Hathras refused to deliver the goods without the defendant s consent and delay occurred In the meantime the price of the particular kind of grain fell and the speculation resulted in a loss to the plaintiffs *Held* on suit by the plaintiffs for compensation instituted at Hathras that the case was for compensation under section 212 of the Contract Act in respect of the direct consequences of the defendant s neglect and misconduct and that the cause of action arose at Karachi and the suit therefore did not lie in the court at Hathras

Salig Ram v Chaha Mal 49

——————SECTION 47—*Execution of decree—Interlocutory order—Appeal*] The court executing a decree struck off the proceedings upon the ground of wilful default on the part of the decree holder in prosecuting his claim Subsequently however finding that the decree holder had not really been in default the court cancelled its former order held that an attachment which was in existence at that time still subsisted and that execution should proceed *Held* that this was not an order to which section 47 of the Code of Civil Procedure 1908 applied

Observations of BANERJEE J in *Jogodishury Debea* v *Kailash Chundra Lahiry* I L. R. 24 Calc., 725, followed.

Mukhtar Ahmad v Muqarrab Husain 530

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CIVIL PROCEDURE CODE (1908) SECTION 48—*Execution of decree—Limitation—Execution prevented by fraud of judgement debtor*] Upon a correct interpretation of clause 2 of section 48 of the Code of Civil Procedure (1908) the effect of the proviso embodied in that clause is that the bar to execution created by the first clause of the same section is removed for a period of twelve years from any date on which the judgement debtor has by fraud prevented the execution of the decree *Sreenath Goho* v *Yusoof Khan* I L R 7 Calc 556 dissented from

Mohsin Ali *v* Masum Ali 20

——— SECTION 60 (1) *(c)—Execution of decree—Mortgage—Agriculturist's house not appurtenant to his holding*] *Held by* RICHARDS C J and TUDBALL J (BANERJEE J *dissentiente*) that section 60 of the Code of Civil Procedure will not operate to bar the sale of a house belonging to an agriculturist in execution of a decree on mortgage of the same if such house is not an appurtenance of the mortgagor's holding which he is prohibited by law from mortgaging or transferring

Per BANERJI —The Legislature clearly intended that no court should sell a house belonging to and occupied by an agriculturist provided that the house is of the description mentioned in clause *(c)* of the proviso to section 60 Code of Civil Procedure and it makes no difference in the powers of the court whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged The proviso forbids both attachment and sale that is where an attachment must precede a sale it forbids attachment as well as sale and where attachment is not a preliminary step it forbids sale *Ram Dial* v *Narpat Singh* I L R 33 All 136 referred to

Bhola Nath *v* Musammat Kishori 25

——— SECTION 115—*Revision—Interlocutory order—Scope of section*] *Held* by KARAMAT HUSAIN J —that an application under section 115 of the Code of Civil Procedure cannot be entertained in the case of those interlocutory orders against which though no immediate appeal lies a remedy is supplied by section 105 which provides that they may be made a ground of objection in appeal against the final decree *Moti Lal Kashibhai* v *Nana* I L R 18 Bom 35 followed Inasmuch as an order under order IX rule 13 setting aside an *ex parte* decree can be attacked in appeal from the final decree, no application will lie for revision of such an order *Gopala Chetti* v *Subbier* I L R 26 Mad 604 followed

Nand Ram *v* Bhopal Singh I L R 34 All 592

——— SECTION 115 *See* Criminal Procedure Code section 470 394

——— SECTION 148 ORDER XXXIV RULE 8—*Mortgage—Redemption—Mortgage money not paid within time limited by decree—Power of court to extend*] Section 148 of the Code of Civil Procedure applies to cases in which the time fixed by the Code of Civil Procedure for the doing of some act is extended and not to the extending of the time fixed by a mortgage decree for the payment of a prior mortgage

The plaintiff in a suit for redemption of a mortgage obtained a decree which provided in the event of non payment not that he should be debarred from all right to redeem the mortgaged property but that his suit should be dismissed Owing to a *bonâ fide* mistake the plaintiff paid into court within the time limited less than the sum actually due

Held that the court had power under order XXXIV rule 8 of the Code of Civil Procedure to extend the time limited for payment of the full decretal amount

Het Singh *v* Tika Ram [illegible]

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CIVIL PROCEDURE CODE (1908) ORDER IX RULES 8 AND 9 SECTION 151—*Dismissal of suit for default—Restoration—Sufficient cause—Court's inherent power to restore*] Order IX rule 9 of the Code of Civil Procedure 1908 makes it compulsory on a court to set aside a dismissal under rule 8 where the plaintiff satisfies the court that there was sufficient cause for non appearance It however cannot take away the court's power to restore the case for any other valid reasons

Lalta Prasad *v* Ram Karan 426

———————ORDER XVII RULE 3 ORDER IX RULE 4—*Adjourned hearing—Suit dismissed on merits—Remedy of plaintiff—Procedure*] At an adjourned hearing of a suit in the court of a Munsif the plaintiffs were not present and their pleader intimated to the court that he had no instructions to go on with the case The suit was thereupon dismissed under order XVII rule 3 of the Code of Civil Procedure 1908 on the ground that the claim was not proved The plaintiffs then made an application for restoration under order IX rule 4 The munsif dismissed the application and his order was affirmed by the District Judge

Held on application in revision by the plaintiffs that no revision lay The suit having been dismissed under order XVII rule 3 of the Code on the merits the plaintiffs remedy was by way of appeal against the Munsif's decree. *Lalta Prasad* v *Nand Kishore* I L R 22 All 66 followed

Gaura Bibi *v* Ghasita 123

———————ORDER XXI RULE 23—*Remand—Finding that burden of proof has been wrongly laid without finding that the decision of the first court is wrong*] It is not a good ground for passing an order of remand under order XLI rule 23 of the Code of Civil Procedure to say that the preliminary issue has been decided by the court of first instance on a wrong view of the burden of proof unless the appellate court also finds that that decision is wrong

Habib ullah Khan *v* Lalta Prasad 612

———————ORDER XXI RULE 35—*Suit for recovery of joint possession—Form of decree—Practice*] *Held* that a plaintiff who is entitled to possession jointly with other persons can be granted a decree for joint possession whether the plaintiff was originally in joint possession and was subsequently dispossessed or whether he had never been in possession *Phani Singh* v *Nawab Singh* I L R 28 All 161 dissented from *Bhairon Rai* v *Saran Rai* I L R 26 All 588 *Rahman Chaudhri* v *Salamat Chaudhri* Weekly Notes 1901 p 48 *Watson & Co* v *Ram Chand Dutt* I L R 18 Calc 10 and *Bhola Nath* v *Buskin* Weekly Notes 1894 p 127 referred to

Jagarnath Ojha *v* Ram Phal 150

———————ORDER XXI RULE 57—*Execution of decree—Attachment—Application for execution dismissed but subsequently restored on review*] By a mistake of the Court an application for execution against property which was under attachment was dismissed but the decree holder obtained a review of that order and the executing court has directed to proceed There was no order removing the attachment *Held* on application by the decree holder to sell the attached property that the attachment still subsisted and was valid as against a sale made by the judgement-debtor previous to the review

Aziz Bakhsh *v* Kaniz Fatima Bibi 400

———————ORDER XXI RULE 89—*Execution of decree—Property sold by judgement-debtor to a third person after execution*

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sale—Judgement-debtor not competent to apply to have auction sale set aside] Where a judgement debtor after the sale in execution of his immoveable property sold such property to a third party it was *held* that the judgement debtor was not competent thereafter to apply under order XXI rule 89 of the Code of Civil Procedure 1908 to have the execution sale set aside *Debi Prasad Pandit* v. *Muhammad Unis Arabi* 14 Oudh Cases 33 approved

Ishar Das v Asaf Ali Khan 186

CIVIL PROCEDURE CODE (1908) ORDER XXXIV *See* Act No IV of 1882 sections 88 89 72

——— ORDER XXXIV RULE 1 *See* Hindu Law 549 572

——— ORDER XXXIV RULE 6 *See* Act No III of 1907 sections 16 and 31 10.

——— ORDER XLI RULE 22—*Procedure—Cross objections entertainable though appeal was not o—Act No I of 1877 (Specific Relief Act) sections 39 and 42—Separate suit for cancellation of a document and for possession—Practice*] A respondent may file cross-objections and the appellate court may act upon them notwithstanding that the appeal in which such objections are filed is not maintainable

Ordinarily where a plaintiff is out of possession and he is in a position to claim a decree for possession he should not be permitted to obtain merely a decree for the cancellation of an instrument according to which if genuine he has no title

Shankar Lal v Sarup Lal 140

——— ORDER XLI RULE 33—*Appeal—Procedure—Power of appellate court to interfere with portion of decree not challenged by either party*] Plaintiff sued defendant for rent and obtained a decree for a portion of his claim Plaintiff then appealed against the disallowance of the balance of the amount claimed but defendant submitted to the decree and neither filed a cross appeal nor took objections under order XLI rule 22 of the Code of Civil Procedure 1908

Held that it was not competent to the appellate court acting under order XLI rule 33 to interfere with the decree obtained by the plaintiff in so far as it had not been challenged by defendant *Attorney General* v *Simpson* 2 Ch D, 671 referred to

Rangam Lal v Jhandu 32

COMPENSATION for frivolous or vexatious accusations *See* Criminal Procedure Code section 250 354

COMPROMISE *See* Act No I of 1872 section 44 143

——— *See* Hindu Law 65

CONCLUSIVE PROOF *See* Act (Local) No II of 1901 section 9 285

CONSIDERATION Effect of non payment of — *See* Act No IX of 1872 section 39 273

CONSTRUCTION OF DOCUMENT *See* Hindu Law 405

——— *See* Land holder and tenant 545

——— *See* Civil Procedure Code (1882) sections 584 585 579

——— 1908 *See* Letters Patent, section 10 13

——— *See* Mortgage 416

——— *S* Muhammadan Law 478

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CONTRACT—*Covenant in sale deed to discharge a debt due to a third party —Suit for compensation for breach—Actual damage not necessary to support suit—Cause of action—Limitation Act No XV of 1877 schedule II article 116*] On a sale of immoveable property the vendees covenanted with the vendors to pay a certain sum of money on account of a mortgage debt due by the vendors They did not pay in accordance with the covenant and the mortgagee thereupon brought a suit upon his mortgage and obtained a decree

Held on suit by the vendors for compensation for breach of the covenant that it was not necessary that the vendors should have suffered any loss before they could bring their suit and that as no time was specified in the sale deed for the payment of the mortgage money limitation began to run from the date of the execution of the deed *Lethbridge* v *Mytton* 2 B & Ad 772 *Carr* v *Roberts* 5 B & Ad 78 *Loosemore* v *Radford* 9 M & W 657 *Ashdown* v *Ingamells* L R 5 Exch D 280 *Dorasinga Tevar* v *Arunachalam Chetti* I L R 23 Mad 441 *Raghunath Rai* v *Brijmohan Singh*, Weekly Notes 1901 p 14 *Kumar Nath Bhuttacharjee* v *Nobo Bhuttacharjee* I L R 26 Calc 241 and *Battley* v *Faulkner* 3 Barn & Ald, 288 22 R R, 390 referred to

Raghubar Rai *v* Jaij Rai 429

————*See* Act No IX of 1872 section 39 273

————*See* Minor 296

COPY Time requisite for obtaining—— See Act No IX of 1908 section 12 41

COURT Inherent powers of— See Execution of decree 518

COURT FEE See Act No VII of 1870 schedule II article 17 (vi) 184

————See Civil Procedure Code (1882) section 411 293

CRIMINAL MISAPPROPRIATION See Criminal Procedure Code section 179 487

CRIMINAL CASE See Criminal Procedure Code sections 145 526 533

CRIMINAL PROCEDURE CODE SECTIONS 107 145—*Security to keep the peace—Dispute concerning land likely to lead to a breach of the peace —Procedure*] Where there exists a dispute relating to immoveable property which is likely to lead to a breach of the peace the magistrate concerned is not necessarily bound to proceed under section 145 but can take action—and this may some times be the better course—equally under section 145 of the Code of Criminal Procedure *Sheoraj Roy* v *Chatter Roy* I L R 32 Calc 966 and *Emperor* v *Ram Baran Singh* I L R 28 All 406 followed *Mahadeo Kunwar* v *Bisu* I L R 25 All 537 distinguished *Daljit Singh* v *Bhoju* I L R 35 Calc 170 not followed

Emperor *v* Thakur Pande 419

————————SECTIONS 145 526—*Transfer— Criminal case — Accused person*] *Held* that the expression 'criminal case' as used in section 526 of the Code of Criminal Procedure includes a proceeding initiated under section 145 of the Code and that the High Court under section 526 has power to transfer such a proceeding from one court to another court subject to all the conditions under which a transfer can be made *Arumuga Tgundan* I L R 26 Mad 188 *Lalit Mohan Moitra* v *Suraj Kanta Acharje* I L R 28 Calc 703 and *Gurudas Nag* v *Gaganendra Nath Tagore* 2 C L J., 614 referred to *In re Pandurang Govind Pujari* I L R., 25 Bom 179 dissented from

An accused person is one over whom a criminal court exercises jurisdiction *Queen Empress* v *Mulasaddi Lal*, I L R 21 All 107 followed

Jaggu Ahir *v* Murli Shukul 533

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CRIMINAL PROCEDURE CODE SECTION 133—*Public nuisance—Construction of dam causing injury to village lands*] A B and C being contiguous villages of which C lay at a lower level than A and B the surplus water falling on A and B used to run off through certain natural channels over the lands of village C The inhabitants of C erected a dam to keep the water from their land and by so doing caused flooding of and damage to the lands of A and B *Held* that the area and number of persons affected by the action of the inhabitants of C were sufficient to justify a magistrate in treating their action as a public nuisance and taking steps to abate it under section 133 of the Code of Criminal Procedure

Emperor *v* Bharosa Pathak 345

—————— SECTION 177—*Jurisdiction—Effect of place where offence was committed ceasing to be British territory*] An offence was committed in March 1910 at a place which was then part of the Mirzapur district Subsequently one of the persons alleged to have taken part in the commission of such offence was arrested in Bengal and sent to Mirzapur when he was committed by the Joint Magistrate to take his trial before the Court of Session In the meanwhile the place where the offence was committed had ceased to be British territory *Held* that this fact did not oust the jurisdiction of either the Magistrate or the District Judge of Mirzapur

Emperor *v* Ganga . 461

—————— SECTION 179—*Criminal misappropriation —Jurisdiction— Place where consequences of act ensued*] The word consequence in section 179 of the Criminal Procedure Code means a consequence which forms a part and parcel of the offence It does not mean a consequence which is not such a direct result of the act of the offender as to form no part of that offence

Hence where an agent in charge of a branch shop in Sultanpur misappropriated money belonging to his principal, which should have been sent to the head office at Cawnpore it was held that the courts at Cawnpore had no jurisdiction to try the agent for criminal misappropriation. *Queen Empress* v *O Brien* I. L R 19 All 111, and *Colville* v *Kristo Kishore Bose* I L R 26 Calc 746 distinguished *Babu Lal* v *Ganesham Das* 5 A L J 333 referred to

Ganeshi Lal v Nand Kishore . . 487

—————— SECTION 195 (7) CLAUSES (*a*) (*b*) AND (*c*) —*Sanction to prosecute—Sanction refused—Further application—Case — Principal court of original jurisdiction*] In a suit for arrears of rent exceeding Rs 100 a decree was passed in favour of the appellant In course of execution proceedings the respondents made certain statements which according to the appellant were false. The appellant applied for sanction to prosecute them under section 195 clause (7) of the Code of Criminal Procedure. The sanction was refused by the Assistant Collector

Held on application made to the District Judge to grant sanction that no such application lay The case in connection with which an offence was alleged to have been committed was the proceedings in execution from which no appeal lay and the District Judge was not in relation to such proceedings the principal court of original jurisdiction.

Ajudhia Prasad *v* Ram Lal 197

—————— SECTIONS 195 476—*Sanction to prosecute—Sanction set aside by superior court and order for prosecution under section 476 substituted—Jurisdiction*] *Held* that a court hearing an application under section 195 of the Code of Criminal Procedure to revoke sanction for a prosecution granted by a subordinate court

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has jurisdiction to set aside the order of the subordinate court and direct a prosecution under section 476 of the Code *In the matter of the petition of Mathura Das* I L R 26 All 80 overruled.

Chadammi v Lalta Prasad 602

CRIMINAL PROCEDURE CODE SECTION 195 (c)—*Sanction to prosecute—Forgery—Offence alleged not in connection with any proceeding before any Court—Sanction unnecessary*] By section 195 clause (c) of the Code of Criminal Procedure courts are prohibited from taking cognizance of an offence described in section 463 of the Indian Penal Code when such offence has been committed by a party to any proceeding in any court in respect to a document produced or given in evidence in any such proceeding The section does not remove from the cognizance of criminal courts an offence described in section 463 when such an offence has been committed by an ordinary individual So long as the prosecution is confined to offences connected with a document committed prior to its production in court, such prosecution is within the law and requires no sanction

Emperor v Lalta Prasad 654

——————SECTION 195 See Act No XLV of 1860 sections 182 211 522

——————SECTION 250—*Frivolous or vexatious complaint—Award of compensation to accused—Award to be made by order of discharge or acquittal and not by separate order*] *Held* that section 250 of the Code of Criminal Procedure was not intended to meet the case of false accusations, but of frivolous and vexatious accusations

Held also that the direction to pay compensation in a case found to be frivolous or vexatious cannot be made in a subsequent proceeding but must form part of the order of discharge or acquittal

Ram Singh v Mathura 354

——————SECTION 407—*Sanction to prosecute—Application to Magistrate of the first class—Appeal to District Magistrate—Transfer—Jurisdiction*] Section 407 of the Criminal Procedure Code does not entitle a District Magistrate to send appeals under section 195 of that Code to a Magistrate of the first class subordinate to him. That section deals with appeals from convictions *Sadhu Lall* v *Ram Churn Pasi* I. L. R. 30 Calc, 394 followed

Emperor v Lal Singh 241

——————SECTION 423—*Appeal—Power of appellate court to alter finding of acquittal into one of conviction*] An appellate court can under section 423 of the Criminal Procedure Code in an appeal from a conviction after the finding of the lower court and find the appellant guilty of an offence of which the lower court has declined to convict him. *Queen Empress* v *Jabanulla* I. L. R. 23 Calc 975 followed.

Emperor v Sardar 115

——————SECTION 476—*Preliminary inquiry—Revision*]—When a Magistrate takes action under section 476 of the Code of Criminal Procedure it is not necessary to the validity of his order that he should hold a preliminary inquiry nor if he does hold preliminary inquiry it is necessary that he should give the person against whom such inquiry is being held an opportunity of cross-examining the witnesses *Queen Empress* v *Mataladal* I. L. R. 15 All 392, followed.

Abdul Ghafur v Raza Husain 267

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CRIMINAL PROCEDURE CODE section 476— Court' —Civil Procedure Code (1908) section 115—Revision—Inexpediency of order no ground for revision of the civil side] The word "court" in section 476 of the Code of Criminal Procedure includes the successor of the Judge before whom the alleged offence was committed Bahadur v Eradat ullah Mallick I. L. R 37 Calc. 612 followed

Whether a particular order is expedient or not is not a ground on which the High Court can interfere in revision under section 115 of the Civil Procedure Code.

In the matter of the petition of Nawab Singh 394

CUSTOM See Land holder and tenant 545

—— See Pre-emption 431 542

DECREE Form of— See Civil Procedure Code (1908) order XXI rule 35 150

——Preliminary and final—— See Partition 493

DISTRICT JUDGE Powers of— See Act No XII of 1887 sections 8 and 21 205

DIVORCE See Act No IV of 1869 section 57 203

ELECTION See Municipality 649

ESTOPPEL—Estoppel by conduct—Hindu law—Adoption by Hindu widow under authority of her husband—Subsequent suit to set aside adoption as invalid—Denial of any valid authority to adopt—Adopted son having on faith of representations by widow married performed shradh of adoptive father and incurred heavy liabilities in maintaining his change of status and privileges] In this case which was an appeal from the decision of the High Court in Dharam Kunwar v Balwant Singh I L R 30 All 549 their Lordships of the Judicial Committee while expressing their opinion that the question in the case might well be decided as one of fact on the appellant's own statement without recourse to the doctrine of estoppel did not differ from the view of the High Court as to the applicability of that doctrine The appellant they held had asserted her authority to adopt in the most solemn manner under her hand and seal, and her conduct both before and after that assertion had been of a like unequivocal character She could not now be allowed to change her story without grave injustice ensuing to the respondent who had acted in reliance upon her deliberate and repeated representations The estoppel however their Lordships said must be taken as being purely personal and did not bind any one claiming by an independent title

Dharam Kunwar v Balwant Singh 398

——Occupancy holding mortgaged to zamindar and sold in execution of a decree on the mortgage as a fixed rate holding—Ejectment of purchaser—Right of purchaser to recover possession—Possessory title] An occupancy holding was mortgaged to the zamindar as a fixed rate holding was sold as such in execution of a decree on the mortgage and purchased by a stranger who remained in possession thereof for some eleven years paying rent to the zamindar Subsequently the purchaser was dispossessed by the judgement-debtor Held on suit by the purchaser to recover possession that the defendant was estopped from setting up the plea that the holding was an occupancy holding and that the defendant having no title at all, the plaintiff was entitled to regain possession on the strength of his possessory title.

Azhar Husain v Pal Ahir 583

——See Civil Procedure Code (1882) section 43 172

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ESTOPPEL See Mortgage 640

——See Suit for declaration of invalidity of adoption 8

EVIDENCE See Act No I of 1872 sections 11 and 32 341

——See Act No I of 1872 sections 14 15 39

——See Act No I of 1872 section 69 615

——See Act No I of 1872 section 91 158

——See Act No I of 1872 section 103 36

——See Act No I of 1872 section 114 511

——See Act No III of 1877, sections 32 33 331

——See Act No III of 1877 sections 32 66 75 253

——See Act (Local) No II of 1901 sections 166 201 250

——See Parda nashin lady 455

EXECUTION OF DECREE—*Assignment*—Ex parte *order passed subsequent to assignment—Power of court on application of assignee to reconsider such order*] Pending an application for execution of a decree the decree holder sold the decree The purchaser applied for execution but whilst his application was pending the former application of the original decree-holder came on for hearing and it was decided *ex parte* that the decree was barred by limitation *Held* that this decision was no bar to the consideration of the application for execution filed by the assignee of the decree nor was the court hearing this application bound by the former *ex parte* finding

Balmakund v Ashfaq Husain 518

——*Decree passed in favour of several persons one of whom was a minor and not properly represented*] *Held* that the mere fact that at the time when the final decree in a suit was passed one of the decree holders was a minor whose guardian *ad litem* had died and had not been replaced was not sufficient to invalidate the decree

Gobardhan Sahai v Mahabir Singh 321

——See Act No. XV of 1877 schedule II article 178 436

——See Act No. III of 1907 sections 16 and 31 106

——See Civil Procedure Code (1882) section 230 397 636

——See Civil Procedure Code (1882) sections 278 279, 280 281 305

——See Civil Procedure Code (1908) section 47 530

——See Civil Procedure Code (1908) section 48 20

——See Civil Procedure Code (1908) section 60 (1)(c) 25

——See Civil Procedure Code (1908) order XXI, rule 57 400

——See Civil Procedure Code (1908) order XXI rule 89 180

——See Pre-emption 595

FERRY See Act No XVII of 1878 section 23 146

FIXED RATE HOLDING See Estoppel 533

——See Act (Local) No II of 1901 section 9 285

FIXED RATE TENANT See Land holder and tenant 604

FORGERY See Criminal Procedure Code section 195 (c) 634

GAMBLING See Act No. III of 1867 section 12 96

GIFT See Hindu Law 139

——See Muhammadan law 405, 479

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GUARDIAN AND MINOR, *See* Muhammadan Law 213

HINDU LAW—*Mitakshara—Hindu widow—Gift—Consent of next reversioner not sufficient to validate a gift in favour of sister's son*] *Held* that a gift of her deceased husband's estate made by a Hindu widow in possession thereof as such widow to her sister's son was invalid and could not be rendered operative by the consent of the next reversion *Bajrang Singh* v *Manokarnika Bakhsh Singh* I L R 30 All. discussed.

Abdulla v Ram Lal 123

——— *Hindu—Widow—Co-widow—Partition—Right to enforce partition when joint enjoyment impossible*] Although Hindu widows taking a joint interest in the inheritance of their husband have no right to enforce an absolute partition of the joint estate between them, yet where the widows cannot go on peaceably in the enjoyment of the property they can by mutual agreement or otherwise separately hold the property although they have no right to partition in the proper sense of the term and the share of one will go by right of survivorship to the other notwithstanding the separation *Gajapathi Nilamani* v *Gajapathi Radhamani* I L R 1 Mad 290 *Kathaperumal* v *Venkabai* I L R 2 Mad 194 and *Bhagwandeen Dubey* v *Myna Baee* 11 Moo I A 487 referred to

Chhittar Kunwar v Gaura Kunwar 189

——— *Hindu widow—Suit by remote reversioner to set aside alienation by widow—Immediate reversioner a female having a life estate only—Acceleration of estate*] N died leaving a widow W a daughter R D and a daughter's son K S W during the lifetime of R D made a gift of the property to K. S *Held* on suit by other reversioners more remote than K. S for a declaration that the gift was not binding on them that the suit would lie The question of the acceleration of K. S's estate would not arise because at the date of the gift the donee was not the next reversioner *Balgovind* v *Ram Kumar* I L R 6 All 431 *Hanuman Pandit* v *Jota Kunuar* Weekly Notes 1903 p 907 and *Abinash Chandra Mazumdar* v *Harinath Shaha* I L R 32 Calc 62 followed *Madari* v *Malki* I L R 6 All 428 and *Ishwar Narain* v *Janki* I L R 15 All 132 dissented from. *Rani Anand Koer* v *The Court of Wards* L R 8 I A, 14 I L R 6 Calc 764 referred to

Raja Dei v Umed Singh 207

——— *Hindu widow—Reversioners—Decree fairly obtained against widow binding on reversioners although the widow did not contest the suit*] A decree in a suit against a Hindu widow respecting property of her husband of which she is in possession as such widow may be binding on the reversioners notwithstanding that the widow did not contest the suit provided that the plaintiffs case was properly and fairly stated and the widow had reasonable opportunities of which she did not choose to avail herself of defending the suit

Gur Nanak Prasad v Jai Narain Lal 366

——— *Mitakshara—Impartible property—Succession—Impartible property governed by the rule of primogeniture nevertheless joint property*] Where ancestral property is impartible and is held by a single member of the family all the members of the family must be deemed to be joint in estate and the rule of succession to the property is the same as that which governs the case of partible property so that a junior member of the family who gets maintenance from the person holding the impartible estate succeeds upon his death to the estate by right of survivorship

Whatever may be the powers of alienation of the holder of an impartible estate, the succession to it is governed not by the rule which applies to separate property but by the rule of survivorshi

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Therefore the person who succeeds to the estate does not do so as the heir or legal representative of his predecessor and the estate cannot be regarded as the assets of the last previous holder

Harpal Singh v *Bishan Singh* 6 A L J, 753, followed *Raja of Kalahasti* v *Achigadu* I. L. R, 30 Mad. 454, and *Zamindar of Karvetnagar* v *Trustee of Tirumalai* I. L. R 32 Mad., 429 dissented from.

Indar Sen Singh *v* Harpal Singh 79

HINDU LAW—*Inheritance—Impartible estate governed by the rule of primogeniture—Estate devised to widow of owner—Suit by reversioner—Compromise of suit by widow and reversioner—Descent of estate governed by the compromise and not by will*] The owner of an impartible estate governed by the rule of primogeniture died leaving a will by which he gave an absolute estate to his widow against whom S the next reversioner brought a suit on the ground that the will was invalid and that he was entitled to possession of the estate In that suit the parties came to a compromise, by the terms of which it was agreed that the widow should hold for her life the possession of gaddinashin paying S a monthly allowance and that after her death S or any representative of his who may be living at that time will be the absolute owner of all the movable and immovable properties and will occupy the gaddi S predeceased the widow leaving no male issue and without having made any disposition by will otherwise of his interest in the estate On the death of the widow in possession the widow of S sued to recover the estate from members of her husband s family who had possession of it

Held by the Judicial Committee (affirming the decision of the High Court) that the rights of the parties depended not on the will but on the compromise the terms of which gave S a vested interest in the estate which retained its character of impartibility and on the death of S descended not to his widow (the appellant) but to the respondent his heir according to the rule of primogeniture

Lekhraj Kunwar *v* Harpal Singh 65

——— *Inheritance—Mitakshara—Joint Hindu family—Mother's share on partition of joint family property between her and her sons after father s death*—Stridhan—*Maintenance*] According to the Mitakshara there is no substantial difference in principle between a woman s property acquired by inheritance and that acquired by partition

Held therefore (reversing the decision of the courts in India) that the share which the mother in a joint Hindu family obtains after the death of the father on partition of the joint family property between the mother and the sons is not her *stridhan* but is given for her maintenance and on her death it devolves upon the heirs of her husband not upon her own heirs

Debi Mangal Prasad Singh v *Mahadeo Prasad Singh* I L R 32 All 259 and *Chhiddu* v *Naubat* I L R 24 All. 67 overruled

Debi Mangal Prasad Singh *v* Mahadeo Prasad Singh 234

——— *Mitakshara—Joint Hindu family—Father committed to the Court of Session—Loan taken for his defence—Legal necessity*] *Held* that the necessity of raising money to pay for the defence of the head of a joint Hindu family committed to the Court of Session on a serious criminal charge was a valid legal necessity such as would support a mortgage of the family property executed by the father and one of his sons for such purpose *Chandradeo* v *Mata Prasad* I L R. 31 All, 176 *Luchmun Koour* v *Mudaree Lall* 5 S D A.

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N W P 327 and *Duleep Singh* v *Sree Kishoon Panday* 4 N W P, H C Rep 83 referred to

Beni Ram v Man Singh — 4

HINDU LAW—*Mitakshara—Joint Hindu family—Money borrowed by father at a high rate of interest—Legal necessity—Burden of proof*] When money is borrowed by the father of a joint Hindu family on the security of the family property at a very high rate of interest it is for the lender seeking to enforce his claim to prove not only that there was necessity for borrowing the money but also that there was necessity for borrowing it at an exorbitant rate of interest *Chandradeo* v *Mata Prasad* I L R 31 All 176 *Hurro Nath Rai Chaudhri* v *Randhir Singh* I L R 18 Calc 311 and *Kameswar Pershad* v *Run Bahadur Singh* I L R 6 Calc 843 referred to

Nand Ram v Bhupal Singh — 126

————*Mitakshara—Joint Hindu family—Debt incurred by managing member of family—Presumption as to family necessity or benefit—Burden of proof*] There is no presumption that a debt contracted by the manager of a Hindu firm or family is contracted for the benefit of the firm or family and the plaintiff who seeks to bind the other members of the joint family will have to prove that it was a debt contracted for their benefit or with their consent or that there was an urgent family necessity therefor *Soiru Padmanabh Rangappa* v *Narayanrao bin Vithalrao* I L R 18 Bom 520 *Sunkur Pershad* v *Goury Pershad* I L R 5 Calc 321 *Nagendra Chandra Dey* v *Ama Chandra Kundu* 7 C W N 725 and *Krishna Ramaya Naik* v *Vasudeo Venkatesh Pai* I L R 21 Bom. 808 referred to *Sheo Pershad Singh* v *Saheb Lal* I L R 20 Calc 453 distinguished

Ganpat Rai v Munni Lal — 135

————*Joint Hindu family—Mortgage—Purchase of mortgaged property by managing members—Suit for sale against managing members only—Civil Procedure Code (1908) order XXXIV rule 1*] Where in a suit for sale on a mortgage the defendants mortgagors were the managing members of a joint Hindu family who in that capacity had purchased the mortgaged property it was held that the family was sufficiently represented by the managing members and that the suit would not fail by reason of the non joinder of the other members of the family

Hori Lal v Munman Kunwar — 549

————*Joint Hindu family—Mortgage—Mortgage for the benefit of joint family—Suit for sale by managing member alone—Parties—Civil Procedure Code (1908) order XXXII rule 1*] Where in a suit for sale on a mortgage executed in favour of the manager of a joint Hindu family the plaintiff was the then managing member of the family it was *held* that he was entitled in that capacity to maintain the suit and that it would not fail by reason of the non joinder of the plaintiff who was joint with him. *Hori Lal* v *Munman Kunwar* (1) referred to.

Madan Lal v Kishan Singh — 572

————*Mitakshara—Partition—Whether grandmother entitled to share in the case of a partition between father and sons*] *Held* that upon a partition between a father and his sons the grandmother that is the father's mother does not get a share in the case of a family governed by the Benares school of the Mitakshara law

Radha Kishen Man v *Bachchaman* I L R 3 All 118 followed *Sheo Dayal Tewaree* v *Judoo Nath Tewaree* 9 W R, C R, 61

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Badri Rai v *Bhagwat Narain Dobey* I L R 8 Calc 649 and *Shibbosoondery Dalia* v *Bassoomutty Dalia*, I L R 7 Calc 191 distinguished

Sheo Narain v Janki Prasad 505

HINDU LAW—*Mitakshara—Succession—Great-grandson of the grand father—Grandson of the great-grandfather*] According to the Mitakshara law the three immediate descendants of the grandfather succeed in preference to the great grandfather and his descendants and the great grandson of the grandfather is a preferential heir as against the grandson of the great-grandfather

The following cases were referred to in the judgements delivered — *Kalian Rai* v *Ram Chandar* I L R 24 All 128 *Putcheputty Dutt Jha* v *Rajunder Narain Rae* 2 Moo I A 133 *Kashibai Ganesh* v *Sitabai Raghunath Shiv am* 13 Bom L R 552 *Rachava* v *Kalingapa* I L R 16 Bom 716 *Kureem Chand Gurain* v *Oodung Gurain* 6 W R 158 *Chinna ami Pillai* v *Kunju Pillai* I L R 35 Mad, 152 *Bhyah Ram Singh* v *Bhyah Ugur Singh* 13 Moo I A 373 and *Suraja Bhukta* v *Lakshminarasamma* I L R 5 Mad 291

Buddha Singh v Laltu Singh 663

———*Will—Construction of will—Bequest to testator's daughter in law after death of wife—Whether it conferred an absolute or only a life e tate in the property*] The will of a Hindu testator after reciting that he had no male heir and had already provided for his widowed daughter stated —' I have resolved that after my death my wife legatee No 1 shall remain in possession and enjoyment of all my property with all powers or authority like myself and that after the death of my wife my daughter in law, widow of Raghuraj Singh legatee No 2 shall remain in possession and enjoyment of all the propert es aforesaid like myself and legatee No 1
I therefore execute a will in favour of my daughter in law so that on the demise of myself and my wife the estate and name of my ancestors may continue as before and she in place of Raguraj Singh shall perform my funeral ceremonies and those of my wife according to the *sha htras* and the custom of the family and then she shall have power to nominate any one whom she may think fit as heir so that the name of the family may continue as formerly and now with honour

Held (affirming the dec s on of the Court of the Judicial Commissioner) that on the true construction of the will the word heir meant heir to the testator and the daughter in law took (as did the wife) not an absolute interest but only a life estate in the testator s property wh ch was therefore on her death not liable to attachment and sale under decrees against her representative

Brij Lal v Suraj Bikram Singh 405

———*See* Act No XLV of 1860 section 498 589

———*See* Act No I of 1872 section 60 615

———*See* Estoppel 398

HINDU WIDOW *See* Hindu law 129, 189 207 385

IMPARTIBLE ESTATE *See* Hindu law 65 79

INJUNCTION *See* Act No XV of 1877 schedule II article 178 436

INHERENT POWERS OF COURT *See* Civil Procedure Code (1908) order IX rules 8 and 9 sect on 151 426

INTERLOCUTORY ORDER *See* Civil Procedure Code (1908) section 47 530

———*See* Civil Procedure Code (1908) section 115 502

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INSOLVENCY *See* Act No III of 1907 sections 16 and 31 . 106

——*See* Act No III of 1907 section 16 .. 121

——*See* Act No III of 1907 section 16 and 34 623

——*See* Act No III of 1907 sections 24 and 26 449

JOINT HINDU FAMILY *See* Act No I of 1872 section 69 615

——*See* Hindu law 4 126 135 234, 549 572

——*See* Mortgage 289

JOINT OWNERS—*Partition—Abadi not formally divided but separate portions thereof taken possession of by the various owners—Agreement amongst owner—Rights of owners as to portions in possession of each*] A village was divided into three mahals with the exception of the *abadi* as to which it was found that it had not been divided between the mahals by demarcation on the village map or on the spot but the owners of the mahals had been in separate possession of portions of it

Held that the only possible inference from this finding was that the parties had agreed among themselves as to their possession of the *abadi* and that so long as the agreement continued each party was entitled to use the portion in his possession in any way he pleased so long as such user or possession did not interfere with the user or possession of the owners of the other mahals *Kumudini Mazumdar* v *Rasik Lal Mazumdar* 11 C W N 517 followed

Jagannath Prasad *v* Badri Prasad 119

"JUDICIAL PROCEEDING" *See* Criminal Procedure Code sections 195 476 602

JURISDICTION—*Civil and Revenue Courts—Act (Local) No II of 1901 (Agra Tenancy Act) section 4 95 167 197—Act (Local) No III of 1901 (United Provinces Land Revenue Act) sections 56 233 (i)—Suit for declaration regarding various alleged customary rights of zamindars mostly of the nature of cesses*] A suit was filed by certain tenants of a village against the zamindars praying for a declaration that no custom existed in their village which entitled the zamindars to take certain fruits and wood or to the use of a plough or to a number of other dues including sugarcane juice from some of the tenants poppy seed from the Koeries and various other matters of the same description

Held that the suit was properly filed in a Civil Court and was not excluded from the jurisdiction of such court by anything contained in either the Agra Tenancy Act 1901 or the United Provinces Land Revenue Act 1901

Sheoambar Ahir *v* The Collector of Azamgarh 358

——*Offence committed in British India—Accused committed to Sessions—Transfer of territory to native state—Accused discharged for want of jurisdiction—Revision*] Certain persons were charged with committing an offence at a place in British India and were committed to the Sessions Court of Mirzapur the case being subsequently transferred to the Sessions Court of Benares Before trial however the place where the offence had been committed became part of the newly constituted state of Benares *Held* that the Sessions Court whether of Mirzapur or Benares was not deprived of jurisdiction to dispose of the case which had been committed to it for trial inasmuch as at the time of the transfer to the state of Benares of the place where the alleged offence had been committed the accused were in British India in custody in point of law if not in fact of a court of competent jurisdiction. *Emperor* v *Mahabir*

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I L R 33 All 678 followed. *Damodhar Gordhan v Deoram Kanji* I L R, 1 Bom. 367, distinguished

Emperor v Ram Naresh Singh 118

JURISDICTION *See* Act No I of 1872 section 44 143

——— *See* Act No III of 1867 section 5 597

——— *See* Act No IX of 1887 section 25 348

——— *See* Act No XII of 1887 sections 8 20 383

——— *See* Act No XII of 1887 sections 8 and 21 605

——— *See* Act No VII of 1889 sections 19 26 148

——— *See* Act No IX of 1908 schedule I article 182 482

——— *See* Civil Procedure Code (1882) sections 278 279 280 281 365

——— *See* Civil Procedure Code (1908) section 20 (c) 49

——— *See* Criminal Procedure Code section 177 451

——— *See* Criminal Procedure Code section 179 487

——— *See* Criminal Procedure Code section 195 (7) (a) (b) and (c) 197

——— *See* Criminal Procedure Code sections 195 476 602

——— *See* Criminal Procedure Code section 407 244

KIDNAPPING *See* Act No XLV of 1860 section 366 340

LAMBARDAR AND CO SHARER *See* Act (Local) No II of 1901 section 194 98

LAND HOLDER AND TENANT—*Rights of tenants with regard to groves—Custom—Wajib ul-arz—Construction of document—"Malik"*] The wajib ul arz of a village contained the following provision as to grove land— Persons who have planted a grove and who are in possession of a grove have the rights of an owner (*ikhtiyar malikana*) If any trees fall down they can plant fresh trees without the permission of the zamindar When the land becomes denuded of all trees the planter of the grove will have the first right to cultivate the land

Held that these provisions implied a right of transfer in the possessor of grove land

Muhammad Yasin v Ilahai Bakhsh 145

——— *Fixed rate tenant—Liabilities of fixed rate tenants for rent joint and several and not joint merely—Act No IX of 1872 (Indian Contract Act) section 43*] *Held* that the liability of joint holders of a fixed rate tenancy of payment of rent is joint and several and not joint only The failure therefore of the plaintiff in a suit for rent against several fixed rate tenants jointly to bring upon the record the representatives of a deceased defendant is no bar to the continuance of the suit against the remaining defendants *Jai Gobind Laha v Monmotha Nath Banerji* I L R 33 Calc 580 followed *Muhammad Aska v Radha Ram Singh* I L R 22 All 307, referred to

Abdul Aziz v Basdeo Singh I L R 34 All 604

——— *See* Act No III of 1907 section 16 121

LARCENY *See* Act No XLV of 1860 section 379 69

LEGAL NECESSITY *See* Hindu Law 126 135

LETTERS PATENT SECTION 10—*Appeal from a dissentient judgement in an appeal under section 10—Pre-emption—Wajib ul arz—Custom or contract—Partition of village—No new wajib ul arz framed—Construction of document—"Haqdar"*] *Held* that an appeal will lie under section 10 of the Letters Patent from the

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judgement of a Judge who has differed from his colleague in an appeal under the same section

The wajib-ul arz of an undivided village gave a right of pre emption first to a near co-sharer (*hi a lar karib*) and then to a co-sharer in the villag (*hissalar deh*) Subs quently the village was divided by perfect partition into two mahals No new wajib ul arz was prepared In a suit for pre emption by the co-sharers in one of the mahals consequent upon a sale of property situated in another mahal to a stranger —

Held that the right might be enforced notwithstanding the partition The meaning of the words *deh* and *mahal* discussed by KARAMAT HUSAIN J

Dalganjan Singh v *Kalka Singh* I L R 22 All 1 and *Dori* v *Jiwan Ram* I L R 39 All 265 referred to

Jiwan Ram v Tondi Singh 13

LIMITATION *See* Act No I of 1877 section 30 43

——— *See* Act No XV of 1877 section 19 371

——— *See* Act No XV of 1877 schedule II articles 110 116 464

——— *See* Act No XV of 1877 schedule II article 178 436

——— *See* Act No III of 1907 section 46 (4) 496

——— *See* Act No IX of 1908 section 12 41

——— *See* Act No IX of 1908 section 19 109

——— *See* Act No IX of 1909 section 29 412

——— *See* Act No IX of 1908 section 31 375

——— *See* Act No IX of 1908 schedule I articles 116 120 131 and 132 246

——— *See* Act No IX of 1908 schedule I article 152 482

——— *See* Bengal Regulation No XV of 1793 261

——— *See* Civil Procedure Code (1882) section 2 0 397

——— *See* Civil Procedure Code (1908) section 48 20

——— *See* Contract 429

——— *See* Mortgage 620

——— *See* Muhammadan Law 213

MANDADARI TENURE —*Nature of such tenure—Land held under it not transferable—Occupancy holding*] *Held* that land held under what is known in Gorakhpur chiefly as a *mandadari* tenure is nothing more than an occupancy holding and is not therefore transferable Such land cannot therefore be sold in execution of a decree upon a mortgage thereof

Kedar Nath Kasondhan v Naipal Singh 155

MARRIAGE *See* Act No XLV of 1860 section 498 589

——— *See* Act No IV of 1869 section 57 203

MASTER AND SERVANT *See* Act No I of 1878 sections 5 9 319

MINOR—*Mortgage executed by minor—Money borrowed to discharge debts of father—Contract executed by minor—Effect of*—] In this appeal which was one from the decision of the High Court in *Mata* *Singh* v *Bal ant Singh* I L R 38 All 03 their Lordships of the Judicial Committee on the evidence upheld the decision on the question whether the plaintiff Maharaj was a minor at the time he signed the mortgage and said — Having found as a fact that Maharaj Singh was a minor at that time it is not necessary for their Lordships to consider any other issues This suit has been

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brought on the mortgage deed of the 28th of October 1892 by the assignee of that mortgage and as their Lordships have held that the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh and as Maharaj Singh was then a minor the mortgage deed as against him and his interest in the estate was not merely voidable it was void and of no effect and must be regarded as a mortgage deed to which he was not even an assenting party and as a mortgage deed which did not affect him or his interest in the estate

Balwan Singh v R Clancy I L R 34 All. 295

MINOR See Execution of decree 321

MISCHIEF See Act No VIII of 1873 sections 7 and 70 210

MITAKSHARA See Hindu law 4 176 129 135 505 603

MORTGAGE—*Construction of document— Muakhiza —Act No IV of 1882 (Transfer of Property Act) section 58 100*] A deed the basis of a suit for sale as on a mortgage opened with a recital that the executant had borrowed a sum of money followed by a promise to pay the amount with interest at 2 per cent per month within a certain time and then provided *muakhiza a l o sud ta yom-ul wasul upar* (description of the share) *haqiyat min muqir qaim rahega* *izhar*[a] *batarik tamassuk muhakhiza-i jadad ka likhaya*

Held that this deed could not be construed as a mortgage The word *muakhiza* did not necessarily imply a power of a sale and there was nothing else in the deed from which an intention to give a power of a sale could be inferred

Dalip Singh v Bahadur Ram, I. L R 34 All. 446

————*See* Pre emption 416

————*Decree on mortgage—Decree set aside as against one mortgagor—Second suit to recover proportionate share of the debt maintainable*] A mortgagor died leaving him surviving a brother two daughters and an illegitimate son The four sons of the brother took an assignment of the mortgage from the mortgagee and subsequently brought a suit for sale of the mortgaged property against the children of the mortgagor and inasmuch as they were themselves owners of part of the mortgaged property framed their suit as one for the recovery of specific shares of the mortgage money from the portions of the property in the possession of each of the defendants They obtained in this suit an *ex parte* decree which however was set aside as against one of the daughters upon the ground that she was a minor and not properly represented therein

Held that the plaintiffs were not precluded from maintaining a fresh suit against this defendant for the recovery of a share in the mortgage debt proportionate to her share in the property

Rashid un nissa v Muhammad Ismail Khan I. L R. 34 All. 474

————*Estoppel—Power of representatives of mortgagor to question validity of mortgage—Adverse possession—Possession adverse to mortgagor not necessarily adverse to mortgagee*] *Held* that although the representatives of a mortgagor cannot as such question the validity of the mortgage it may be open to them as *mutawallis* to plead that the property was waqf and that the mortgage of it was void *Gulzar Ali v Fida Ali* I L R 6 All 24 distinguished

Held also that a simple mortgage being not merely a security for a debt but a transfer of an interest in the property mortgaged a trespasser who ousts the mortgagor and holds the property adversely to him may by prescription become the owner of the limited estate which the mortgagor had in the property but such adverse

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possession cannot extinguish the right of the mortgagee *Agency Company* v *Short* L R 13 A C 793 *Smith* v *Lloyd* 9 Ex 562 *Secretary of State for India* v *Krishnamoni Gupta* I L R 29 Calc 518 and *Imdar Khan* v *Ahmad Husain* I L R 30 All 119 referred to *Ramanuiami Chetty* v *Ponna Padayachi* 21 M L J 397 and *Pratap Bahadur Singh* v *Mitheshwar Bakhsh Singh* 12 O C 45 not approved *Atmalar Mandal* v *Makhan Lal Dey* I L R 33 Calc 1015 and *Parthasarathi Naikan* v *Lakshmana Naikan* 21 M L J 407 approved and followed *Karan Singh* v *Bakar Ali Khan* I L R 5 All 1 discussed

Nandan Singh v Jumman 640

MORTGAGE—*Non payment of greater part of mortgage money—Mortgagee allowed to redeem before expiry of term of mortgage*] Certain property was mortgaged by way of conditional sale for Rs 599 15 0 for ten years Of the mortgage money Rs 50 15 0 only were paid and the balance was left with the mortgagees for payment to prior incumbrancers The mortgagees did not pay off the prior incumbrancers and the mortgagor having meanwhile sold the mortgaged property his assignees sued for redemption of the mortgage before the expiry of ten years *Held* that on equitable grounds the defendants not having performed what was a most essential part of the contract the plaintiffs ought to be allowed to redeem before the expiration of the period of ten years

Chhotku Rai v Baldeo Shukul 659

———*Prior and subsequent incumbrancers—Third mortgagee paying off first mortgage and claiming priority as against second mortgagee—Presumption as to intention of third mortgagee*] Where a mortgagee pays off prior incumbrances on the mortgaged property it is to be presumed that he does so with the intention of keeping these incumbrances alive and using them as a shield should occasion arise and he can so use them as much when he is a plaintiff suing for sale as when he is a defendant to an intermediate or subsequent mortgagee's suit If the payment is made in the form of leaving part of the money with the mortgagee to be paid to the prior mortgagees the subsequent mortgagee does not thereby become the agent of the mortgagor for the purpose of paying off the prior mortgages

Gokaldas Gopaldas v *Puranmal Premsukhdas* I L R, 10 Calc, 1035 *Dinobundhu Shaw Choudhry* v *Jogmaya Dasi* I L R 29 Calc 154 and *Jagatdhar Narain Prasad* v *A M Brown* I L R 33 Calc 1133 followed. *Tufail Fatma* v *Bitola* I L R 27 All 400 and *Baij Nath* v *Murlidhar* Weekly Notes 1907 p 85 dissented from

Gur Narain v Shadi Lal 102

———*Prior and subsequent mortgages—Suit by first mortgagee without impleading second—Decree and sale—Subsequent suit by second mortgagee against purchasers under decree in first suit—Plaintiff held bound to redeem first mortgagee*] The plaintiff brought his suit for sale of certain property in satisfaction of a mortgage of the year 1877 which was a renewal of a mortgage of 1875

The defendants were purchasers at a sale in execution of a decree on a mortgage which bore a later date in 1875 than the plaintiff's first mortgage, but was a renewal of a previous mortgage of 1869 To the suit in which this decree had been passed the plaintiff had not been made a party The defendants had been in possession of the property so purchased by them for some twenty years.

Held that the plaintiff had no absolute right to bring the property to sale in satisfaction of his mortgage subject to the mortgage of 1869 and that in the circumstances he ought to redeem that mortgage before bringing the property to sale *Mata Din Kasodhan*

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v Ka im Husain I L R 13 All 432 Ram Shankar Lal v Ganesh Prasad I L R 29 All 385 Har Prasad v Bhagwan Das I L R 4 All 19 Kanti Ram v Kutub-ud din Mahomed I L R 22 Calc 33 Balli o Prasad v Uman Shankar I L R 3? All 1 Mati ullah Khan v Banwari Lal I L R 3? All 138 Kanhai Lal v Halai Singh 9 A L J ?9 Cangayam Venkata ?amana Iyer v Henry James Colley Gomp rtz I L R 31 Mad 1?5 and Har Pershad Lal v Dalmar dan Singh I L R 3? Calc 891 referred to Debendra Narain Roy v Ram aran Banerjee I L R 30 Calc 599 discussed and doubted.

Manohar Lal v Ram Babu 323

MORTGAGE *Prior and subsequent mortgages—Release of part of mortgaged property for less than its value—Suit for recovery of entire balance of mortgage debt from the residue of mortgaged property*] *Held* that a first mortgagee cannot be allowed to release part of the mortgaged property for less than its due proportion of the mortgaged money and then claim a decree against the mortgagor and a puisne mortgagee for the recovery of the whole of the balance of the mortgage money out of the remainder of the property *Mir Yusuf Ali Haji v Panchanan Chatterjee* 15 C W N 800 *Hari Kissen Bhagat v Velait Hasain* I L R 33 Calc 755 and *Iannu ami Mudaliar v Srinivasa Naickan* I L R 31 Mad 333 referred to

Jugal Kishore Sahu v Kedar Nath 606

——— *Redemption Subsequent agreement qualifying right to redeem —Loss of deed—Onus of proving terms of mortgage—Act No I of 1869 (Oudh Estates Act) section 6—Limitation—Compromise barring right to redemption*] There is nothing in law to prevent the parties to a mortgage from coming to a subsequent arrangement qualifying the right to redeem.

In this case the mortgage which it was sought to redeem was dated in 1846 and in 1870 the mortgagors had in consideration of certain additional benefit reserved to them under a compromise agreed to subject their right of redemption to certain conditions The deed having been lost the onus was on the plaintiffs to prove the terms of the mortgage so as to show that the suit was not barred by section 6 of the Oudh Estates Act (I of 18?9) [see *Raja Kishen Dutt Ram Panday v Narendar Bahadoor Singh* L R 3 I A 85] which onus he was found unable to discharge

Held (affirming the decision of the Judicial Commissioner of Oudh) that the plaintiffs were not in any case entitled to redeem as long as there was no breach by the defendants of the covenants contained in the compromise

Shankar Din v Gokal Prasad 620

——— *Suit for redemption of usufructuary mortgage—Defendants setting up title under sale of mortgagor s interest—Title by adverse possession—Separation of member of joint Hindu family and purchase of property with self acquired means—Possession adverse to mortgagors*] These were cross appeals from the decision of the High Court in *Muzaffar Ali Khan v Parbati* I L R 29 All 640 The plaintiffs relied on a usufructuary mortgage of 1846 and sued for redemption of the property in suit two shares in a village called Lohari The case of the defendants was that they were in possession not under the mortgage but under sales of the 27th of May 1853 and the 20th of March 1854 respectively by which the equity of redemption in the shares mortgaged in 1846 had passed to those through whom they claimed title and they pleaded adverse possession Both the lower courts had upheld the later sale and dismissed the suit as to that share in Lohari As to the earlier sale the courts below had differed the first court upholding it and the High Court deciding in favour of the plaintiffs On appeals by both parties it was

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immaterial in the view taken by their Lordships of the Judicial Committee of that sale (27th May 1853) by what title Ashraf un nissa one of the widows of the mortgagor obtained the share she took and whether or not she had a daughter who survived him Her share was certainly transferred by the sale to Baldeo Sahai who though he was the grandson of one of the mortgagees and the son of the other with both of whom he had lived as a member of a joint Hindu family had according to reliable evidence separated from them and at the time of the sale was carrying on with a nucleus of property derived from his grandmother a money lending business from the profits of which he was enabled to purchase with self acquired funds the share in Lohari from Ashraf un nissa who purported to sell it to him as a person who was not a mortgagee under the mortgage of 1846 and he was therefore not precluded from setting up a title by adverse possession which it was conclusive in the evidence he had held for more than 0 years Th ir Lordships therefore while affirming the decision of the courts below as to the later sale reversed the decision of the High Court as to the earlier sale and upheld that transaction also

Parbati *v* Muzaffar Ali Khan 289

MORTGAGE *See* Act No III of 1877 section 50 63

——— *See* Act No IX of 1872 section 39 273

——— *See* Act No IV of 1882 section 90 63

——— *See* Act No IV of 1882 section 101 268

——— *See* Act No IX of 1908, section 31 375

——— *See* Act No XVI of 1908 section 17 (2) (xi) 528

——— *See* Bengal Regulation No XV of 1793 261

——— *See* Civil Procedure Code (1882) section 4 223

——— *See* Civil Procedure Code (1908) section 60 (1) (c) 25

——— *See* Civil Procedure Code (1908) section 11 599

——— *See* Hindu Law 549 572

——— *See* Minor 296

——— *See* Pre emption 153

——— *See* Pre emption 416

"MUAKHIZA, *See* Mortgage 446

MUHAMMADAN LAW—*Gift of a fixed share of offerings made at a shrine—Possession of subject of gift*] *Held* that gift of the right to receive a certain share of the offerings wh ch might be made at a particular shrine was a valid gift and not repugnant to the doctrines of the Muhammadan Law *Amtul Nissa Begam* v *Mir Nurudin Husain Khan* I L R 22 Bom. 489 distinguished

Ahmad ud-din *v* Ilahi Bakhsh 465

——— *Hanafi law—Gift—Construction of document—Condition in derogation of the grant invalid*] A deed of gift of certain property provided as follows —

My son Naki Khan will remain owner (*malik*) of the remaining two thirds and of the said two-thirds Naki Khan will remain full and absolute owner of one third (*malik kamil o katai*) and he shall have the powers of an owner with respect to it, and Naki Khan will be owner (*malik*) of the other third also and his name will be entered in the khewat but the income of it is given for the maintenance of my minor grandson Muhammad Shafi Khan, son of Muhammad Taqi Khan deceased According to law Naki Khan is guardian of Shafi Khan he must give the income of that one-third for the maintenance of the minor and Naki Khan will not have the power of transfer over that one-third during the life of the minor

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Held on a contruction of the deed that the condition against alienation was invalid but the condition as to the payment of one third of the income to Muhammad Shafi Khan was valid and attached to the property in the hands of a transferee who was found to have notice thereof *Nawab Umjad Ali Khan v Musammat Mohumdee Begum* 11 Moo I A 517, followed

Lali Jan v Muhammad Shafi Khan 478

MUHAMMADAN LAW—*Guardian—Construction of will—Alienation of property of minor by his brother acting as executor of will and guardians of minor —Sale not binding on minor—Right of suit to redeem mortgage Act No XV of 1877 (Indian Limitation Act) schedule II articles 44 and 144*]—A Muhammadan testator by his will left all his property to his four grandsons (brothers) but did not expressly appoint any executors of his will or guardians of such of his grand children as might be minors at his death nor was there in the will any intention to entrust the administration of the property to any particular invidials The testator died in 1887 and on the 15th of June 1889 the three elder grandsons on their own behalf and purporting to act also as the guardians of the fourth grandson the respondent (plaintiff) then a minor sold some of the property to the appellant (defendant) The appellant was a mortgagee of two villages on the estate under two mortgages executed by the testator on the 2nd of December 1885 and the 7th of August 1886 for ten years and seven years respectively and the effect of the sale had been to pay off the later mortgage on the smaller village and other debts by selling the larger village to the mortgagee The respondent attained his majority in 1892 or 1893 and treating the sale of the 15th June 1889 as a nullity and the mortgage as still subsisting he tendered to the appellant the amount of mortgage money necessary to redeem the larger village and on the appellant refusing to accept it brought a suit for redemption on the 14th of September 1905

Held that the elder brothers were not authorized either by the will or by the Muhammadan law to act as guardians of the minor and he was entitled on attaining his majority to treat the transaction of the 15th of June, 1889 as being void as against him

Held also that the possession of the appellant did not become adverse to the respondent until the expiry of the term of the mortgage of 1885 namely the 2nd of December 1895 and therefore the suit was not barred by the 12 years period provided by article 144 of schedule II of the Limitation Act (XV of 1877) Article 44 schedule II of the same Act was not applicable as the sale was made not by a guardian but by an unauthorized person

Mata Din v Ahmad Ali 213

MUNICIPAL RULES *See* Act (Local) No I of 1904 section 23 391

MUNICIPALITY—*Election—Practice—Petition against elected member on ground of personation of voters—Limitation—Fresh instances of personation allowed to be pleaded after expiry of time for filing petition*] An elector on the roll of a municipality filed a petition under the rules framed in that behalf by the Local Government against a successful candidate in a municipal election alleging various instances of personation of voters for which the opposite party was stated to be legally responsible The petition was filed within the time limited by law *Held* that it was competent to the court in which such petition was presented to allow the petition to be amended by the addition of fresh instances of personation

Nawab Khan v Muhammad Zamin 649

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NUISANCE Public—— *See* Criminal Procedure Code section 133 — 345

OBJECTIONS *See* Civil Procedure Code (1908) order XII rule 22 — 140

OCCUPANCY HOLDING *See* Act (Local) No II of 1901 section 22 — 419

—————— *See* Estoppel — 538

—————— *See* Mandadari tenure — 155

OPIUM *See* Act No I of 1878 sections 5 9 — 319

OSTENSIBLE OWNER *See* Act No IV of 1882 section 41 — 22

PARDA NASHIN LADY—*Execution of deed depriving herself of nearly all her property—Burden of proof—Requisites to be proved—Concurrent finding on facts that burden had not been discharged—First court's decision on that point affirmed by appellate court—Finding sufficient to dispose of case*] A parda nashin lady separated from her husband unable to read or write and without independent legal advice created an endowment of practically her whole property by a deed of which she appointed the appellants (plaintiffs) trustees In a suit for a declaration that the property was waqf and for possession of it

Held that as they relied upon the deed the onus was on the appellants to show that the nature and effect of it had at the time of its execution been explained to and understood by the executant

Shambati Koeri v *Jago Bibi*, I. L. R., 29 Calc 749 L. R. 29 I. A 127 followed.

Upon the question whether that onus had been discharged the appellate court in India affirmed the decision of the first court to the effect that it had not but nevertheless allowed an appeal to His Majesty in Council under section 596 of the Civil Procedure Code (XIV of 1882) on the ground that the judgement of the lower court had not been *wholly* affirmed.

Held that the findings of the courts below amounted to concurrent findings of fact which could not be disturbed on appeal and there being no substantial question of law the appeal must be dismissed. *Karuppanan Servai* v *Srinivasan Chetti* I L. R., 25 Mad 215 L. R. 29 I. A. 38 followed.

Sajjad Husain *v* Wazir Ali Khan — 455

PARTIES. Array of— *See* Hindu Law — 549 572

—————— *See* Act No I of 1872 section 69 — 615

PARTITION—*Appeal against preliminary decree—Final decree passed during pendency of appeal—Cross objections filed against final decree—Appeal against preliminary decree maintainable*] Where the plaintiffs in a suit for partition had preferred an appeal from the preliminary decree and had also in the defendant's appeal from the final decree filed cross objections it was *held* that there was no bar to the hearing of the plaintiffs appeal against the preliminary decree. *Kuria Mal* v *Bishambhar Das* I. L. R. 32 All. 225 and *Narain Das* v *Balgobind* 8 A. L. J 601 distinguished

Muhammad Akhtar Husain Khan *v* Tasadduq Husain — 493

—————— *See* Hindu Law — 187 231 505

—————— *See* Joint owners — 313

—————— Suit for—*See* Act No. VII of 1870 schedule II article 17 (vi) — 134

PLEADINGS—*Suit for cancellation of father's will brought by daughters—Plea of custom excluding daughters from inheritance—Custom not allowed to be raised in this suit*] On suit by the daughters of the

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Held on a contruction of the deed that the condition against alienation was invalid but the condition as to the payment of one third of the income to Muhammad Shafi Khan was valid and attached to the property in the hands of a transferee who was found to have notice thereof *Nawab Umjad Ali Khan v Musammat Mohumdee Begum* 11 Moo I A 517 followed

Lali Jan *v* Muhammad Shafi Khan 478

MUHAMMADAN LAW—*Guardian—Construction of will—Alienation of property of minor by his brother acting as executor of will and guardians of minor—Sale not binding on minor—Right of suit to redeem mortgage Act No XV of 1877 (Indian Limitation Act) schedule II articles 44 and 144*]—A Muhammadan testator by his will left all his property to his four grandsons (brothers) but did not expressly appoint any executors of his will or guardians of such of his grand children as might be minors at his death nor was there in the will any intention to entrust the administration of the property to any particular invididuals The testator died in 1887 and on the 15th of June 1889 the three elder grandsons on their own behalf, and purporting to act also as the guardians of the fourth grandson the respondent (plaintiff) then a minor sold some of the property to the appellant (defendant) The appellant was a mortgagee of two villages on the estate under two mortgages executed by the testator on the 2nd of December 1885 and the 7th of August 1886 for ten years and seven years respectively and the effect of the sale had been to pay off the later mortgage on the smaller village and other debts by selling the larger village to the mortgagee The respondent attained his majority in 1892 or 1893 and treating the sale of the 15th June 1889 as a nullity and the mortgage as still subsisting he tendered to the appellant the amount of mortgage money necessary to redeem the larger village and on the appellant refusing to accept it brought a suit for redemption on the 14th of September 1905

Held that the elder brothers were not authorized either by the will or by the Muhammadan law to act as guardians of the minor and he was entitled on attaining his majority to treat the transaction of the 15th of June 1889 as being void as against him

Held also that the possession of the appellant did not become adverse to the respondent until the expiry of the term of the mortgage of 1885 namely the 2nd of December 1895 and therefore the suit was not barred by the 12 years period provided by article 144 of schedule II of the Limitation Act (XV of 1877) Article 44 schedule II of the same Act was not applicable as the sale was made not by a guardian but by an unauthorized person

Mata Din *v* Ahmad Ali 213

MUNICIPAL RULES *See* Act (Local) No I of 1904 section 23 891

MUNICIPALITY—*Election—Practice—Petition against elected member on ground of personation of voters—Limitation—Fresh instances of personation allowed to be pleaded after expiry of time for filing petition*] An elector on the roll of a municipality filed a petition under the rules framed in that behalf by the Local Government against a successful candidate in a municipal election alleging various instances of personation of voters for which the opposite party was stated to be legally responsible The petition was filed within the time limited by law *Held* that it was competent to the court in which such petition was presented to allow the petition to be amended by the addition of fresh instances of personation

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NUISANCE Public— *See* Criminal Procedure Code section 133 — 345

OBJECTIONS *See* Civil Procedure Code (1908) order XLI rule 22 — 140

OCCUPANCY HOLDING *See* Act (Local) No II of 1901 section 22 — 419

——— *See* Estoppel — 538

——— *See* Mandadari tenure — 155

OPIUM *See* Act No I of 1878 sections 9 — 319

OSTENSIBLE OWNER *See* Act No IV of 1882 section 41 — 22

PARDA NASHIN LADY—*Execution of deed depriving herself of nearly all her property—Burden of proof—Requisites to be proved—Concurrent finding on facts that burden had not been discharged—First court s decision on that point affirmed by appellate court—Finding sufficient to dispose of case*] A parda nashin lady separated from her husband unable to read or write and without independent legal advice created an endowment of practically her whole property by a deed of which she appointed the appellants (plaintiffs) trustees In a suit for a declaration that the property was waqf and for possession of it

Held that as they relied upon the deed the onus was on the appellants to show that the nature and effect of it had at the time of its execution been explained to and understood by the executant

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Sajjad Husain *v* Wazir Ali Khan — 455

PARTIES Array of— *See* Hindu Law — 549 572

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PARTITION—*Appeal against preliminary decree—Final decree passed during pendency of appeal—Cross objections filed against final decree—Appeal against preliminary decree maintainable*] Where the plaintiffs in a suit for partition had preferred an appeal from the preliminary decree and had also in the defendant s appeal from the final decree filed cross objections it was *held* that there was no bar to the hearing of the plaintiffs appeal against the preliminary decree. *Kunja Mal* v *Bishambhar Das* I L R 32 All 275 and *Narain Das* v *Balgobind* 8 A L J 601 distinguished

Muhammad Akhtar Husain Khan *v* Tasadduq Husain — 493

——— *See* Hindu Law — 189 234 505

——— *See* Joint owners — 113

———Suit for—*See* Act No VII of 1870 schedule II article 17 (vi) — 184

PLEADINGS—*Suit for cancellation of father s will brought by daughters—Plea of custom excluding daughters from inheritance—Custom not allowed to be raised in this suit*] On suit by the daughters of the

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testator for a declaration that a will alleged to have been executed by their father was a false and fraudulent document and not binding on them, the defendants set up a custom by virtue of which the daughters but not apparently daughters sons were excluded from inheritance to their father s property

Held that as member of their father's family the daughters who, but for the will on the death of their mother would take the property of their father had a cause of action which entitled them to bring the suit and the issue whether or not a custom existed excluding them from inheritance was not a fit and proper issue to be determined in the present suit

Riseli *v* Balak Ram 351

POSSESSION *See* Muhammedan Law 465

POSSESSORY TITLE *See* Estoppel 538

PRACTICE *See* Civil Procedure Code (1903) order XXI rule 35 1.0

——— *See* Civil Procedure Code (1903) order XLI rule 22 140

——— *See* Criminal Procedure Code section 476 267

——— *See* Execution of decree 518

——— *See* Municipality 649

——— *See* Privy Council 57

PRE EMPTION *Conditional decree—Decretal amount deposited in court—Decree enhanced in appeal—Additional payment made not covering amount withdrawn a co ts*] A successful plaintiff pre-emptor deposited in court the amount of the decree in his favour but subsequently withdrew therefrom the amount of the costs decreed in his favour On the amount payable being enhanced on appeal he paid into Court the difference between the original and appellate decrees *Held* that the decree had been fully complied with *Gopal Saran* v *Ishri* I L R, 6 All 351 *Balmukand* v *Pancham* I L R 10 All 400 *Parmanand Raot* v *Gobardhan Sahai* I L R 28 All. 676 and *Bechai Singh* v *Shami Nath* 8 A L J Notes, p 27 followed

Ali Husain *v* Amin ullah 596

——— *Muhammadan Law—Demand made on the premises*'*—Demand made in the abadi which was part of the premises sold*] Where a person claiming pre-emption in respect of a certain zamindari share prove that he had made the demand with witnesses while sitting on his *chabutra* in the *abadi* which formed part of the premis s sold it was *held* that the demand of pre-emption was a good demand made on the premises within the meaning of the Muhammadan law *Kulsum Bibi* v *Faqir Muhammad Khan* I L R 18 All 298 followed.

Muhammad Usman *v* Muhammad Abdul Ghafur . 1

——— *Muhammadan law—Talab i mawasibat*] Where a person immediately on hearing of the sale of a house exclaimed *mera haq shafa hai* and without any delay took the price and brought it to the vendee and claimed the house *held* that the expression used by him coupled with the circumstances constituted a sufficient first demand *Muhammad Abdul Rahman Khan* v *Muhammad Khan* 8 A L J 270 distinguished.

Muhammad Nazir Khan *v* Makhdum Bakhsh 53

——— *Custom—Wajib-ul-arz—Owner of isolated revenue free plots—Evidence of custom*] The pre-emptive clause of a wajib ul arz contained the following provision — If the owner of a share wish to sell it he shall do so first to his near relation who may be a

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co-sharer in the zamindari and in case of his refusal to anyone he likes

Held that this by itself was not sufficient evidence of a custom giving owners of isolated revenue free plots of land in the village a right to pre-empt

Mawasi v Mul Chand 434

PRE EMPTION—*Wajib ul-arz—Custom—Effect of joining in the purchase a co-sharer having an inferior right*] The vendee in a suit for pre-emption having equal rights with the pre emptor disables himself from resisting a suit for pre-empt on as much by associating with himself in the purchase another co-sharer whose rights are inferior to those of the pre-emptor as by associating with himself a stranger

Gupteshwar Ram v Rati Krishna Ram 542

——— (pre mortgage)—*Joint usufructuary mortgage—Further simple mortgage on share of one mortgagor in favour of same mortgagee—What amount the claimants of the right to pre mortgage are liable to pay*] Certain persons made a joint usufructuary mortgage of their property On the same day one of them executed a deed by way of a further charge or simple mortgage of his share in favour of the same mortgagee In a suit for pre mortgage of his share in this second mortgagor it was *held* that the plaintiffs were not liable to pay the sum secured by the deed of further charge which was a separate and independent transaction but were entitled to pre mortgage upon paying such amount of the mortgage debt as was proportionate to the share of the said mortgagor

Kalla v Hargian I. L. R. 34 All 416

— *See* Letters patent section 10 13

PRE MORTGAGE, *See* Pre emption 416

PRESENTATION *See* Act No III of 1877 section 32 355

PRESUMPTION *See* Act No I of 1872 section 108 36

——— *See* Act No III of 1877, sections 32 60 75 253

——— *See* Act No III of 1877 sections 32 33 331

——— *See* Act No IV of 1882 section 101 263

——— *See* Act (Local) No II of 1901 sections 166 201 250

——— *See* Mortgage 102

PRIMOGENITURE *See* Hindu law 65

PRINCIPAL AND AGENT *See* Act No. IX of 1872 section 235 168

——— *See* Act (Local) No. II of 1901 section 194 92

——— *See* Civil Procedure Code (1908) section 20 (c) 49

PRIOR AND SUBSEQUENT INCUMBRANCERS *See* Mortgage 102 323 606

PRIORITY, *See* Act No III of 1877 section 60 631

PRIVY COUNCIL—*Practice—Point of law as a ground of appeal which had not been dealt with by the courts below—Appeal heard* ex parte] It is contrary to the practice of the Judicial Committee to allow a point to be raised on appeal before them which had not been discussed in the courts below and on which their Lordships have not got the assistance of those courts

Jit Singh v Maharaj Singh 57

PROCEDURE *See* Act No XLV of 1860 sections 182 211 522

——— *See* Civil Procedure Code (1908) order XVII, rule 3 order IX rule 4 123

——— *See* Civil Procedure Cod (1908) ord r XXI, rule 23 612

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PROCEDURE See Civil Procedure Code (1908) order XLI, rule 23	21
——— See Criminal Procedure Code, sections 107 145	419
——— Criminal Procedure Code section 250	[illegible]
PROMISSORY NOTE See Act No I of 1872 section 91	[illegible]
"PUBLIC CHARITABLE OR RELIGIOUS PURPOSES See Civil Procedure Code (1908) section 92	[illegible]
RAILWAY See Act No IX of 1890 sections 75 80	422
——— See Act No IX of 1890 section 125	91
RAILWAY COMPANY Liability of— See Act No IX of 1890 section 75	[illegible]
RECEIPT See Act No II of 1899 section 65	192
——— See Act No XVI of 1908 section 17 (2) (xi)	573
REDEMPTION OF MORTGAGE See Bengal Regulation No. XV of 1793	2 1
——— See Civil Procedure Code (1908), section 148 order XXXIV rule 8	339
——— See Mortgage	620
——— See Mortgage	609
REGISTRATION See Act No. III of 1877 section 32	355
——— See Act No III of 1877 sections 32 60 75	253
——— See Act No III of 1877 sections 32, 33	231
——— See Act No III of 1877 section 50	631
——— See Act No XVI of 1908 sections 36 73 77	315
——— See Act No XVI of 1908 section 17(2) (xi)	573
——— See Act No XVI of 1908 sections 73 74, 77	165
RELEASE of part of mortgaged property See Mortgage	606
RELIGIOUS ASSEMBLY See Act No XLV of 1860 section 296	78
REMAND See Civil Procedure Code (1908) order XXI rule 23	612
RENT Liability of tenant for— See Land holder and tenant	604
RES JUDICATA, See Civil Procedure Code (1882) section 13	1,2
——— See Civil Procedure Code section 11	599
RESTORATION of suit dismissed for default See Civil Procedure Code (1908) order IX, rules 8 and 9 section 151	4 6
REVERSIONER See Hindu Law	207

REVIEW OF JUDGEMENT—*Effect of order on review.—Appeal from original decree*] The effect of the granting of an application for review is to supersede the decree which is the subject of such application. No appeal can therefore be maintained against the decree anterior to the review but only against the subsequent decree *Kaer Sen* v *Ganga Ram* Weekly Notes 1890 p 144 and *Kanhaiya Lal* v *Baldeo Prasad* I L R. 28 All. 240 followed. *Uma Kunwari* v *Jarbandhan* I. L. R 30 All. 479 distinguished.

Brijbasi Lal v Salig Ram	283
REVISION See Act No IX of 1887, section 25	348
——— See Act No III of 1907 sections 24 and 26	442
——— See Civil Procedure Code (1908) section 115	593
——— See Criminal Procedure Code section 476	267
——— See Criminal Procedure Code section 476	394
——— See Jurisdiction	118
SANCTION TO PROSECUTE See Act No XLV 1860 sections 181 211	522

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SANCTION TO PROSECUTE *See* Criminal Procedure Code section 195 (7) (*a*) (*b*) and (*c*) 197

—— *See* Criminal Procedure Code sections 195 476 602

—— *See* Criminal Procedure Code section 195 (*c*) 654

—— *See* Criminal Procedure Code section 407 244

SECOND APPEAL *See* Civil Procedure Code (1882) sections 584, 585 579

SECURITY TO KEEP THE PEACE *See* Criminal Procedure Code sections 107 145 419

SPECIFIC PERFORMANCE *See* Act No I of 1877 section 30 43

STAMP *See* Act No II of 1899 section 65 192

STRIDHAN *See* Hindu Law 234

SUB MORTGAGE *See* Act No IV of 1882 section 90 63

SUCCESSION *See* Act (Local) No II of 1901 section 22 419

—— *See* Act (Local) No II of 1901 section 22 658

—— *See* Hindu Law 65 69

—— *See* Hindu law 663

SUCCESSION CERTIFICATE *See* Act No VII of 1889 sections 19 23 148

SUIT for compensation for breach of contract *See* Contract 409

—— through booked goods *See* Act No IX of 1890 sections 75 80 422

——for declaration of invalidity of an adoption—*Suit dismissed as time barred—Plaintiff debarred from obtaining a decree for possession on title*] When the setting aside of an adoption is essential to the granting of a decree for possession of immovable property the fact that a suit to set aside the adoption has become time barred is a bar to the granting of a decree for possession on title *Lachman Lal Chowdhri* v *Kanhaya Lal Mowar* I L R 22 Calc 609 referred to *Nathu Singh* v *Gulab Singh* I L R 17 All 167 and *Chandania* v *Salig Ram* I L R 26 All 40 distinguished

Chunni Lal *v* Sita Ram 8

—— relating to payments in the nature of cesses *See* Jurisdiction 3[illegible]8

——for partition *See* Act No VII of 1870 schedule II article 17 (vi) 184

——for profits *See* Act (Local) No II of 1901 sections 163 201 6[illegible]0

——for recovery of joint possession *See* Civil Procedure Code (1908) order XXI rule 35 250

——for restitution of conjugal rights *See* Act No IX of 1908 section 29 412

——*in forma pauperis* *See* Civil Procedure Code (1882) section 411 223

——to compel registration *See* Act No XVI of 1908 sections 73 74 77 165

——to compel registration *See* Act No XVI of 1909 sections 35 73 77 315

——to recover arrears of annuity charged on immovable property *See* Act No IX of 1908 schedule I articles 116 120 131 and 132 246

——to recover rent on a registered lease *See* Act No XV of 1877 schedule II article 110 464

——to set aside alienation made by a Hindu widow *See* Hindu law 207

——Dismissal of—, *See* Civil Procedure Code (1908) order XVII, rule 3, order IX, rule 4 123

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SUIT Dismissal of—— *See* Civil Procedure Code (1908), order IX rules 8 and 9 section 151

SUNNIS *See* Muhammadan Law

"TALAB-I MAWASIBAT" *See* Pre-emption

THEFT *See* Act No XLV of 1860 section 379

TRANSFER *See* Criminal Procedure Code section 407 9

—— *See* Criminal Procedure Code sections 145 526 55

TRLES *See* Land holder and tenant

TRUST, *See* Act No II of 1882 section 88

—— *See* Civil Procedure Code (1882) section 539

WAJIB UL-ARZ *See* Civil Procedure Code (1882) sections 584 585

—— *See* Letters Patent section 10 13

—— *See* Pre-emption 431 512

WARRANT for search of house *See* Act No III of 1867, section 5 597

WILL *See* Hindu law 405

—— Construction of—— *See* Muhammadan law 213

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SANCTION TO PROSECUTE *See* Criminal Procedure Code section 195 (7) (a) (b) and (c) 197
———— *See* Criminal Procedure Code sections 195 476 603
———— *See* Criminal Procedure Code section 195 (c) 654
———— *See* Criminal Procedure Code section 407 244
SECOND APPEAL *See* Civil Procedure Code (1882) sections 584 585 570
SECURITY TO KEEP THE PEACE *See* Criminal Procedure Code sections 107 145 449
SPECIFIC PERFORMANCE *See* Act No I of 1877 section 20 43
STAMP *See* Act No II of 1899 section 65 192
STRIDHAN *See* Hindu Law 234
SUB MORTGAGE *See* Act No IV of 1882 section 90 63
SUCCESSION *See* Act (Local) No II of 1901 section 22 419
———— *See* Act (Local) No II of 1901 section 22 658
———— *See* Hindu Law 65 69
———— *See* Hindu law 663
SUCCESSION CERTIFICATE *See* Act No VII of 1889 sections 19 23 148
SUIT for compensation for breach of contract *See* Contract 499
———— through booked goods *See* Act No IX of 1890 sections 75 80 422
——for declaration of invalidity of an adoption—*Suit dismissed as time barred—Plaintiff debarred from obtaining a decree for possession on title*] When the setting aside of an adoption is essential to the granting of a decree for possession of immovable property the fact that a suit to set aside the adoption has become time-barred is a bar to the granting of a decree for possession on title *Lachman Lal Chowdhri* v *Kanhaya Lal Mowar* I L R 22 Calc 609 referred to *Nathu Singh* v *Gulab Singh* I L R 17 All 167 and *Chandania* v *Salig Ram* I L R 26 All 40 distinguished

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———— relating to payments in the nature of cesses, *See* Jurisdiction 358
——for partition *See* Act No VII of 1870 schedule II article 17 (vi) 184
——for profits *See* Act (Local) No II of 1901 sections 166, 201 650
——for recovery of joint possession *See* Civil Procedure Code (1908), order XXI rule 35 250
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——*in forma pauperis* *See* Civil Procedure Code (1882) section 411 223
——to compel registration *See* Act No XVI of 1908 sections 73 74 77 165
——to compel registration *See* Act No XVI of 1908 sections 36 73 77 815
——to recover arrears of annuity charged on immovable property *See* Act No. IX of 1908 schedule I articles 116 120 131 and 132 246
——to recover rent on a registered lease *See* Act No XV of 1877 schedule II article 110 464
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REVERSIONER *See* Hindu Law — 207
REVIEW OF JUDGEMENT—*Effect of order on review—Appeal from original decree*] The effect of the granting of an application for review is to supersede the decree which is the subject of such application No appeal can therefore be maintained against the decree anterior to the review but only against the subsequent decree *Kuer Sen* v *Ganga Ram* Weekly Notes 1890 p 144 and *Kanhaiya Lal* v *Baldeo Prasad* I L R 28 All., 240 followed *Uma Kunwari* v *Jarbandhan*, I L R 30 All 479 distinguished
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—to compel registration *See* Act No XVI of 1908 sections 36 73 77 315

—to recover arrears of annuity charged on immovable property *See* Act No. IX of 1903 schedule I articles 116 120 131 and 132 246

—to recover rent on a *registered lease* *See Act No XV of 1877* schedule II, article 110 464

—to set aside alienation made by a Hindu widow *See Hindu law* 207

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